87-1464

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON, JR.,

Petitioners,

– against –

ALICANTO, S.A. and WILLIAM H. SHAW,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 1, 1988

QUESTION PRESENTED

Does appeal lie from the interlocutory denial of a motion for attachment and vacatur of a temporary restraining order ancillary to the motion, when the defendants expressly concede that without a restraining order or writ of attachment, there will be no property within the jurisdiction against which the plaintiffs could satisfy a judgment?

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The petitioners Spiro T. Agnew and William H. Woolverton, Jr., respectfully pray that a writ of certiorari issue to review the summary order of the United States Court of Appeals for the Second Circuit filed on December 3, 1987.

OPINIONS BELOW

The unpublished summary order of the Second Circuit Court of Appeals of December 3, 1987 is printed in the appendix App. A-1.[1] The order appealed from, the unreported decision of the

[1] A citation commencing with "App." refers to a page or pages in the appendix.

United States District court for the Eastern District of New York, dated May 27, 1987 is printed as App. A-4. The transcript of the proceedings in the District Court on May 14, 1987 in which that court orally dissolved the temporary restraining order appears at App. A-8.

JURISDICTION

The order of the Court of Appeals for the Second Circuit denying rehearing was entered on January 21, 1988, App. A-13 and that court's order staying its mandate pending application for certiorari was entered on February 3, 1988. App A-14. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1987).

STATUTES INVOLVED

28 U.S.C. §1291 Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

New York Civil Practice Law and Rules, Article 62

For the purposes of this petition, the most relevant provisions are:

§ 6201 Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or

4. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53.

§ 6210. Order of attachment on notice; temporary restraining order; contents.

Upon a motion on notice for an order of attachment, the court may, without notice to the defendant, grant a temporary retraining order prohibiting the transfer of assets by a garnishee as provided in subdivision (b) of section 6214. The contents of the order of attachment granted pursuant to this section shall be as provided in subdivision (a) of section 6211.

§ 6211. Order of attachment without notice.

(a) When granted; contents. An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount to be secured by the order of attachment including any interest, costs and sheriff's fees and expenses, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the amount specified in the order of attachment.

* * *

Federal Rules of Civil Procedure for the United States District Courts

For the purposes of this petition, the most relevant portion is:

Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, . . . The remedies thus available include arrest, attachment . . . and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

STATEMENT OF THE CASE

The court of appeals decision of December 3, 1987, App. A-1, concludes with the statement, "We express no opinion on the merits of either the motion for order of attachment or the underlying case." Accordingly this petition is confined entirely to the narrow issue of appealability as defined by the December 3 decision. The facts and background are set forth below only to the extent necessary to acquaint the Court with the posture of the case at the time the district court made the order appealed from and the context in which that order was rendered.

District Court Jurisdiction

The plaintiffs, who are citizens and residents of the United States invoked the jurisdiction of the district court on two grounds: (1) under 28 U.S.C. § 1332, the defendants being (a) Alicanto, S.A., an Argentine corporation with its principal office in Buenos Aires, not qualified to do business in New York, and (b) Shaw, an Argentine national, resident in Buenos Aires. He is the chief executive officer and sole stockholder of Alicanto. Plaintiffs also invoke jurisdiction of the district court under RICO, 18 U.S.C. §1964(c).

Facts

Alicanto maintained an office in New York City and was engaged in representing American companies who wished to do business in Argentina. Plaintiff Woolverton is a former executive vice-president and director of the Alicanto.

For some months in 1980, Aydin Corporation, a manufacturer and constructor of telecommunications and other electronic systems, had unsuccessfully attempted to be invited to bid on an extensive telecommunications system for the Argentine armed services. Aydin's failure to gain entree to the then ruling Military Junta led to a meeting in Washington D.C. in October 1980 among the plaintiff Agnew, who had previously made the acquaintance of members of the Junta, Alicanto and Aydin. They there engaged Agnew to introduce Aydin to the Junta so it might qualify to bid on the telecommunications system. They agreed to compensate him for his efforts with a percentage of the payments that Aydin would receive from the Argentine government should it be successful in securing a contract for a telecommunications system.

Agnew then went to Buenos Aires, and called upon Junta members on Aydin's and Alicanto's behalf. Following negotiations for "a year or so," according to Shaw, Aydin was notified early in 1982 that it was to be awarded a contract for a telecommunications system for the Argentine air force.

However, long before that, in early 1981, not long after Agnew's October 1980 visit to Buenos Aires, Shaw fraudulently told him that his calls on Junta members had been fruitless because "for budgetary reasons" no contract was to be awarded. In fact, correspondence and a tape recording that Shaw sent to Woolverton establish that at the time of Shaw's misrepresentations to Agnew in early 1981, he, Aydin and Alicanto were actually in active negotiation for the telecommunications system with the Argentine air force that they ultimately contracted for and delivered.

Only in 1984, after Aydin's contract had been all but completed, did Angew learn of it. He called Shaw, who told him falsely that it had been a very small contract, on which Alicanto had received a very small commission, $60,000 or $160,000. He offered Angew $25,000. Angew accepted but was never paid despite repeated requests, ultimately being told falsely by Shaw that Argentine exchange restrictions prevented payment. In fact Shaw then had over a million dollars on deposit in New York City. Only in early 1985 did Agnew learn the truth: the Aydin contract was for $57 million, with Shaw and Alicanto receiving over $8,000,000 in commission.

Agnew and Woolverton make claims for breach of contract, services rendered, fraud and RICO injuries. Woolverton had performed extensive services for Alicanto on the Aydin contract but had never been compensated for them. His previous and unvaryingly extreme difficulties in extracting compensation from Shaw finally compelled him to recognize that Shaw had never intended to pay him for his services when rendered but only when and if it was essential to do so in order to induce Woolverton to render further services of equal or greater value.

Shaw and Alicanto had never intended to pay Woolverton for the Aydin contract because the promised percentage on it that was rightfully due Woolverton was so large as to be out of all proportion to the value of any and all future services that Woolverton might ever render.

Proceedings Below

On December 30, 1986, the plaintiffs brought suit and moved pursuant to Federal Rule of Civil Procedure ("FRCP") 64 ex parte for an order of attachment pursuant to the New York Civil Practice Law and Rules ("CPLR") § 6211 or in the alternative for a temporary restraining order ("TRO") under CPLR § 6210 prohibiting the transfer of certain assets of the defendants, pending the attachment motion. The court denied ex parte attachment but granted the TRO, setting the attachment motion for January 9, 1987.

The return date was thereafter repeatedly delayed for extended periods upon the defendant's successive requests with consents to corresponding extensions of the restraining order. Ultimately, on March 4, 1987, seven and one-half weeks after the date originally set by the court for return of the plaintiffs' attachment motion, the defendants moved for further protracted extension of the return on the ground that the plaintiffs' complaint and motion for attachment raised so many complex issues that it could only be adequately answered by the defendants preparing a motion for summary judgment to "be considered simultaneously with" the plaintiffs' motion. The extension requested by the defendants was granted upon their consent to a like extension of the temporary restraining order.

On April 24, 1987, fifteen weeks after the initial return date of the plaintiffs' attachment motion, the defendants served a 900-page summary judgment motion as their answer to the plaintiffs' attachment motion. Three weeks later, on May 14, 1987, in open court before the plaintiffs had had time to prepare a response to the defendants' 900-page motion, as the district court immediately acknowledged, App. A-9, 10, the defendants moved on one-day's notice to the plaintiffs, to dissolve the restraint and deny the attachment. The district court orally granted the defendant's motion in disregard of its order of March 4 directing that the plaintiffs' attachment motion and the defendants' summary judgment motion "shall be considered simultaneously." App. A-9, 10.

Upon the plaintiff's motion for rehearing, the district court adhered to his oral order of May 14 with his order of May 27, 1987, App. A-4, from which the appeal that is the subject of this petition was taken. On June 22, 1987, the court of appeals granted a stay of the district court's order pending appeal, which stay has been continued in effect by the court of appeals staying its mandate pending application for certiorari. App. A-14.

On October 2, 1987, while the plaintiffs' appeal from the denial of the attachment and dissolution of the TRO was still

pending and had yet to be argued, the district court denied in all respects the 900-page summary judgment motion that the defendants had submitted in support of their motion to dissolve the TRO and in opposition to the plaintiffs' motion for attachment.

REASONS FOR GRANTING THE WRIT

The decision that is the subject of this petition is in conflict with decisions of this court as well as of other federal courts of appeals, including decisions of other panels of the United States Court of Appeals for the Second Circuit. In addition, the decision of the court of appeals is plainly erroneous in that it does not address the grounds for the plaintiffs' appeal from the district court but rests instead upon a prior Second Circuit case, involving a factual framework entirely different from that in the present case.

I. The court of appeals decision is in conflict with decisions of this court and other courts of appeals

In *Swift & Co. Packers v. Compania Columbiana del Caribe*, 339 U.S. 684, 689 (1950) this court, by Mr. Justice Frankfurter, held that an order vacating an attachment is appealable, characterizing appellate review of an "order dissolving the attachment at a later date" as "an empty rite after [the property] had been released and the restoration of the attachment only theoretically possible." That is the situation faced by the plaintiffs here if the defendants' assets subject to the temporary restraining order are released.

On this, the defendants themselves have expressly made a critical and dispositive concession in their memorandum of law, dated June 9, 1987, filed in opposition to the plaintiffs' motion in the court of appeals for a stay pending appeal. There they categorically state, on page 3:

> We concede that plaintiffs have shown injury in the event the stay is denied by reason of the fact they will

> not have property in New York against which to satisfy a judgment.

There can be no question that following dissolution of the temporary restraining order, the defendants' assets now subject to it would be moved out of the United States and most likely out of Argentina, and thus put forever beyond the reach of any judgment the plaintiffs might obtain. In the course of their deposition of the plaintiff Woolverton, the defendants themselves took pains to make it clear that it was a common and ordinary practice for Argentinians to keep United States dollar assets, as are those subject to the temporary restraint here, outside of Argentina. If the defendants' assets are not subjected to restraint, there is no reasonable probability that the plaintiffs could ever again reach them.

In *American Oil Company v. McMullin*, 433 F.2d 1091, 1096 (10th Cir. 1970) the Court of Appeals for the Tenth Circuit specifically held that an order quashing certain writs of attachment was properly appealable as falling

> "[I]n that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated,"

quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

By the published decisions of the United States Court of Appeals for the Second Circuit as well as those of other circuits as they now stand, appeal is to all intents mandated for plaintiffs like those here who believe they have a meritorious basis for attachment, know beyond doubt that any judgment they get will be uncollectable without one, but are placed in the position in which the plaintiffs here were placed when the district court vacated their temporary restraining order and denied their motion for attachment.

Surely the thrust, the controlling principle and rationale of this court's decision in *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., supra*, resides and inheres in the fact that review of an order dissolving an attachment only upon an appeal from a final judgment may be "an empty rite" as would be the case here. The defendants have forthrightly and unequivocally not only stated that they will move their property from the jurisdiction if and when the TRO is dissolved but have also made it clear that since the property consists entirely of United States dollars, they will not remove it to Argentina, the only other place where the plaintiffs might be likely to find them.

In dismissing the plaintiffs' appeal in this case, the court of appeals relies upon its decision in *Dayco Corp. v. Foreign Transactions Corp.*, 705 F.2d 38 (2d Cir. 1983), decided by a panel including two of the judges in the panel in this case, App. A-2. In doing so the court focused on the procedural aspect of the order appealed from rather than on the injury to the plaintiffs which was the concern of this court in *Cohen* and *Swift & Co.* as well as of many other courts in cases upholding appeals from the denial of security without which a judgment would be uncollectable.

As developed in Point II below, your petitioners believe that the Second Circuit here in its reliance on *Dayco* failed completely to apprehend numerous critical distinctions between *Dayco* and this case, most notably in failing to take into account that a critical ground of appeal in this case was the denial of due process of law to the plaintiffs in the district court's granting the defendants partial summary judgment without affording the plaintiffs opportunity to submit papers and be heard in opposition.

The conflict in decisions on the appealability of orders denying or vacating pre-judgment security are well illustrated by those of the Second Circuit itself. While your petitioners cannot possibly estimate the relative importance of the issue that is the subject of this petition in the entire scheme of the business of this Court, it is clear that in the face of the currently

outstanding decisions of the courts of appeals on this subject, a plaintiff who has had his motion for attachment denied, as these plaintiffs have, with no other source of recovering on a judgment faces the necessity of making an appeal. As the reported case law now stands in the Second Circuit, the mathematical laws of probability give him a better chance of having the issue held appealable than non-appealable.[2]

On September 28th of this year, after this case had been fully briefed, a panel of the Second Circuit handed down its decision in *H&S Plumbing Supplies, Inc. v. BancAmerica Commercial Corp.*, 830 F.2d 4 (2d Cir. 1987). Although that case concerned an appeal from the denial of an order to vacate a notice of pendency, rather than denial of an attachment, it discussed *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and its progeny at some length and noted, as dictum, 830 F.2d at 6:

> In the context of pre-judgment orders concerning attachments, we have permitted appeals from orders denying such remedies, *Maryland Tuna Corporation v. Ms. Benares*, 429 F.2d 307 (2d Cir. 1970); *Chilean Line Inc. v. United States*, 344 F.2d 757 (2d Cir. 1965); *Republic of Italy v. De Angelis et al.*, 206 F.2d 121 (2d Cir. 1953) *but see Dayco Corporation v. Foreign Transactions Corporation, et al.*, 705 F.2d 38 (2d Cir. 1983) * * *

In addition the same court has in *Brastex Corporation v. Allen International, Inc.*, 702 F.2d 326 (2d Cir. 1983) upheld the appeal from an order denying appellant's motion to confirm an

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[2] Based upon the present composition of the Court of Appeals for the Second Circuit and its published decisions on the issue, five of the active judges have held such decisions to be appealable: Circuit Judges Altimari, Miner and Newman in *H&S Publishing Supplies*, referred to in the following paragraph, and Circuit Judges Kearse and Pierce in *Brastex*, also cited below. In *Dayco Corp. v. Foreign Transactions Corp.*, *supra*, Circuit Judges Meskill and Pratt have held them to be non-appealable, while of the sitting retired Judges, Circuit Judge Van Graafeiland has voted against appealability, and Circuit Judge Timbers, for it, in *Braxtex*, although against it in this case.

ex parte order of attachment, citing *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., supra*, and *Cohen v. Beneficial Loan Corp., supra.* In *Glaser v. North American Uranium and Oil Corp.*, 222 F.2d 552 (2d Cir. 1955) the Second Circuit sustained an appeal from an order vacating and setting aside a warrant of attachment and levy, citing *Cohen, Swift & Company* and *Republic of Italy v. De Angelis, supra.*

In Chilean Line Inc. v. United States, 344 F.2d 757, 759 (2d Cir. 1965) the Second Circuit court held:

> Here the denial of the attachment has the same effect as the vacating of a previously granted attachment since in both cases the property sought to be levied upon may be irrevocably lost by the time the issue is finally resolved at trial.

The foregoing Second Circuit decisions are compatible with what appears to be the nearly unanimous law in other circuits H in regard to the appealability of decisions denying plaintiffs security *pendente lite* where it appears that any final judgment will prove uncollectable without it. *See* the Third Circuit in *FDIC V. Greenberg*, 487 F.2d 9 (3d Cir. 1973) (order vacating attachment of realty reversed on appeal.) *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316 (3d Cir. 1982). (order vacating notice of lis pendens as unconstitutional reversed on appeal.) *Britton v. Howard Savings Bank*, 727 F.2d 315 (3d Cir. 1984) (denial of motion for an attachment appealable, citing *Swift & Co. Packers v. Compania Columbiana del Caribe*, 339 U.S. 684, (1950); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, (1949).)

Also the Fifth Circuit in *Beefy King International Inc. v. Veigle*, 464 F.2d 1102 (5th Cir. 1972) (order discharging lis pendens appealable.) The Seventh Circuit. *Suess v. Stapp*, 407 F.2d 662 (7th Cir. 1969) (order cancelling notice of lis pendens appealable, citing *Cohen, supra.*) to the same effect are the Eighth Circuit in *Keith v. Bratton*, 738 F.2d 314, 316 (8th Cir. 1984) (release of notice of lis pendens held appealable, citing *Cohen, supra*; possibility that property could be sold before conclusion of the action would result in irreparable harm to the

plaintiffs, citing *Chrysler Corp., supra.*) the Ninth Circuit, *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 630 (9th Cir. 1982) and in the Tenth Circuit, *American Oil Co. v. McMullin, supra*, 433 F2d 1091 (10th Cir., 1970)

All of the decisions cited above, not excluding *Dayco*, as will be shown, which have held an order denying a motion to confirm an ex parte attachment appealable, would reasonably lead a plaintiff in the position of these plaintiffs to take an appeal from the vacatur of a restraining order and denial of attachment. Under existing authority in the Second Circuit, counsel to a plaintiff in these plaintiffs' position at the time they appealed, would, it seems, perforce be obliged to advise his client that there was clear precedent for the appealability of an order releasing the defendants' property from a restraining order and denying attachment.

Additionally because of the present diversity of opinions among the circuits as well as within the Second Circuit, if appeal was not initially successful, he would be obliged to advise his client that there was a basis for a petition for rehearing as well as for petition to this Court for a writ of certiorari, notwithstanding the mathematically low probability that it would be granted. This imposes an unnecessary burden on the judicial system. For that reason, granting the writ in this case and deciding the matter would not only serve the interests of justice, but would also do away with the contradictions that now prevail, thereby saving the time and expense of judiciary and litigants.

II. The Decision of the court of appeals is plainly erroneous

In the present case, the foreign defendants have expressly stated in writing, as quoted above, that if the restraining order is dissolved and attachment denied, the plaintiffs "will not have property in New York against which to satisfy a judgment." However, contrary to what had been held in *Chilean Line Inc., supra*, the court below has held in dismissing the present appeal App. A-2:

> But in *Dayco*, we distinguished orders denying or refusing to confirm orders of attachment which are not appealable, from orders vacating attachments, which are. The instant case falls into the former category.

In so holding, the decision appears to have put form ahead of substance. Previously, in *Glaser v. North American Uranium and Oil Corp., supra*, 222 F.2d 552, 554 (2d Cir. 1955) this same court held:

> Should the plaintiff be denied appellate review until the whole case is finally adjudicated, judicial support of its position as to the validity of the attachment at that stage would in all probability be a hollow victory.

In 15 C. Wright A. Miller & E. Cooper *Federal Practice and Procedure* § 3911 at 492 (1976), as quoted by the court below in *H & S Plumbing Supplies Inc. the BancAmerica Commercial Corp., supra*, 830 F.2d at 6, the rule is stated that " 'the practical risk that any final judgment will prove uncollectable is sufficient to allow collateral order appeal . . .' " In this case, defendants have made it a certainty that "any final judgment will prove uncollectable" by their frank assertion that they will remove their funds from the jurisdiction if the TRO is dissolved.

In dismissing the plaintiffs' appeal, the court below quoted 9 J.Moore, B. Ward, J. Desha Lucas, Moore's Federal Practice ¶110.13[5] at 171 (2d ed. 1987) "(order denying attachment ordinarily non-appealable)." App. A-2. What Moore says in toto is that "ordinarily an order granting or denying, or vacating or refusing to vacate, an attachment is interlocutory and non-appealable." The text discloses that none of the cases cited in that section of 9 Moore support the statement that an order denying an attachment is "ordinarily non-appealable."

With the critical element in *Swift & Co.*, its holding that appeal from a denial of attachment becomes "an empty rite" when postponed to appeal from final judgment, the examples of non-appealability cited by Moore in support of this proposition are not apposite to *Swift & Co.* Certainly none of them is applicable

to this case where the defendants have expressly stated that without an attachment, plaintiffs will be injured because "they will not have property in New York against which to satisfy a judgment," as set forth above.

Curiously, Moore's entire analysis following the passage quoted above contradicts, rather than supports, the proposition relied upon by the court of appeals. Moore says "An order denying the right to garnish the United States . . . has been held appealable." *Id.* at 172. Likewise with "An order refusing to require security for damages for wrongful attachment . . ." The same with "an order cancelling a notice of lis pendens . . ." Indeed, the context in which the quoted proposition relied upon by the court of appeals appears is in every respect inconsistent with that proposition, the principal cases cited being this Court's decisions in *Swift & Co.* and *Cohen*.

Certainly the two cases discussed by Moore where orders were held to be nonappealable do not tally with the present case. In *West v. Zurhorst*, 425 F. 2d 919 (2d Cir., 1970) the court below held an order refusing to vacate an attachment not appealable, which hardly fits the "empty rite" holding of *Swift & Co.* The same is true of *21 Turtle Creek Square Ltd. v. New York City Teacher's Retirement System*, 404 F.2d 31 (5th Cir. 1969) in quite a different sense. That case denied appealability of an order quashing attachment according to Moore "unless the plaintiff can show that he is harmed by lack of prejudgment security," the very harm that the defendants here have expressly conceded in writing. Citing *Cohen* and *Swift & Co.*, the Court of Appeals for the Fifth Circuit, 404 F.2d at 32-33, speaking obiter said:

> [3,4] Later decisions of the Supreme Court have expanded the scope of final judgments beyond the limited class encompassed by the traditional rule and have stressed that the definition of a final judgment is a pragmatic one. *Gillespie v. United States Steel Corp.* (1964), 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199; *Cohen v. Beneficial Indus. Loan Corp., supra.* Thus the court has held final and appealable ancillary

> orders which determine substantial rights of the parties which, if not promptly reviewed, will subject the appealing party to irreparable harm. [citations omitted]. *Swift* and *Cohen* indicate the general and consistent approach that an order is "final" only if it terminates the matter in controversy below. When a seemingly interlocutory order has been held appealable, it has been on the theory irreparable injury will result from dismissal of the appeal or that the particular narrow issue with which the order was concerned is wholly separable from the remainder of the case and the order terminates the separable issue . . . In addition, counsel during oral argument admitted that there is no question of loss of security should *Turtle Creek* prevail. Hence the *Swift* and *Cohen* rationale predicated upon irreparable loss of rights is inapplicable here.

In short, in *21 Turtle Creek*, counsel for the plaintiff admitted that there would be no injury to his client, the very opposite of the situation here where counsel for the defendants has expressly conceded that the plaintiffs will be injured if "the stay is denied." 8, *supra*.

In concentrating entirely on the narrow, technical aspect of only one branch of the district court's order, the denial of the plaintiff's motion for attachment, the court below ignored completely the second, equally critical aspect of the order appealed from, its dissolution of the temporary restraining order, granted the plaintiffs on December 30, 1986, under CPLR 6210, and retained in effect for five months at the express instance of the defendants through repeated requests for extensions of time to prepare their summary judgment motion.

It was this restraining order, not the pendency of the attachment motion that prevented the defendants from removing their property from the jurisdiction pending resolution of the attachment motion. This brings the effect of the order appealed from squarely within the rationale and underlying purpose of the Second Circuit decisions asserting the appealability of orders

vacating attachments, which the decision below also says are appealable. App. A-2. CPLR 6210 was adopted in 1977 following decisions in this and other courts invalidating attachments granted ex parte under statutes that did not afford the defendant an adequate hearing before issuance of the writ. 7A Weinstein, Korn and Miller *New York Civil Practice*, ¶6201.04 at 62-15.

Prior to the adoption of 6210, the procedure set forth in both the CPLR, and its predecessor, the Civil Practice Act, provided only for an ex parte attachment, *id.* at 62-82, with the defendant's having no opportunity to oppose except by motion after his property had been attached ex parte without prior notice. CPLR 6210, added in 1977, provides for:

> A temporary restraining order prohibiting the transfer of assets by a garnishee as provided in subdivision (b) of Section 6214.

As stated in Weinstein, Korn and Miller, *New York Civil Practice*, id.:

> The temporary restraining order is designed to protect the plaintiff during the period which will elapse from the time the plaintiff moves for an order of attachment to time the sheriff is able to levy upon each garnishee under the order, after it has been granted.

In other words, a temporary restraining order under § 6210, as was granted here, performs the same function and has the same effect in regard to the rights of the parties in the defendant's property as the ex parte order of attachment under 6211, or as it was under the pre-1977 procedure which provided only for ex parte orders of attachment. For the court below to hold that a decision vacating an ex parte attachment is appealable but that vacatur of a temporary restraining order performing the same function is not, is to draw a distinction predicated entirely on form rather than substance.

Comparison of the *Dayco* case to the present case demonstrates the existence of sharp and critical contrasts between the two in regard both to supporting facts and applicable state

law. Although the decision to which this petition is addressed disclaims any "opinion on the merits of either the motion for order of attachment or the underlying case." App. A-2, it appears clearly that *Dayco* turned on a finding of fact, which not only has no counterpart in the present case, but as to which the exact opposite is incontestably established in this case.

The key passages in *Dayco* in regard to its relationship to the present case appear to be the following:

> One of the grounds for granting an attachment, the *one upon which appellant relies*, is that the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the State, or is about to do so. C.P.L.R. § 6201(3). The district court found that appellant had not sustained its burden of proof on this issue. This was a finding of fact, leading to the discretionary determination made by the district court.

705 F.2d at 39. [Emphasis added.]

> Resolutions of issues of fact seldom lead to the establishment of meaningful precedents, and there is little likelihood of reversal for abuse of discretion or for clearly erroneous findings.[3]
>
> * * *
>
> Resolution of the issue in the instant case—whether the district court correctly applied well-settled rules of law to *disputed facts*—will establish no precedent and will affect only the parties.

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[3] This language raises a question as to the basis of the court's holding in *Dayco*. CPLR §6201 enumerates the jurisdictional grounds for the grant of an attachment. Very clearly a New York court cannot entertain a motion for attachment unless the plaintiff makes a prima facie showing of the existence of one or more of the four grounds set forth in CPLR 6201. There is no indication that the court has discretion to grant an attachment in the absence of any such showing.

705 F.2d at 40. [Emphasis added.]

In actuality it appears that there was no issue of fact in *Dayco* at the time the district judge made the decision that was the subject of the Second Circuit opinion on appeal. She expressly states that "the issue here under discussion [was] defendant's *intent* to remove or secrete assets so as to frustrate a judgment." App. A-31. [Emphasis added.] The plaintiff had argued that the defendants' admission of fraudulent conduct prior to Dayco's bringing suit "[gave] rise to the necessary inference of future intent under § 6201(3)" App. A-25, and, therefore, the plaintiff contended, it was reasonable to infer that the defendant's intent at the time the plaintiff moved to confirm its ex parte attachment was "to defraud and frustrate a judgment in [plaintiff's] favor." App. A-26.

However, it appears that this issue was conclusively disposed of before the district court made its decision because significantly it went on to say, App. A-28:

> It thus appears *and the parties agree*, that the above "admissions" [as to the prior fraud] of Mrs. Reich [the dominant defendant], in and of themselves do not give rise to the inference that she harbors a present intent to frustrate a judgment in the case if one is obtained by plaintiff. [Emphasis added.]

In *Dayco*, this court noted "appellant may move again for attachment should changed circumstances or newly discovered facts warrant such provisional relief." 705 F.2d at 40. In the present case, the court of appeals says, A-2:

> As in *Dayco*, the order here also lacks finality because it is subject to a renewed motion upon a showing of changed circumstances.

Under the cirumstances of this case, this statement by the court like the provision in the order appealed from upon which it is based is no more than a concatenation of words, parsing properly to form a sentence but without intrinsic meaning. Once

the defendants have removed their property from the jurisdiction, which they state unequivocally they will do upon dissolution of the temporary restraining order, there are no reasonably conceivable "changed circumstances" that could lead to a renewed motion. There simply will be nothing that the plaintiffs could attach.

In this respect there is no parallel between the present case and *Dayco*. To be more than the "empty rite" and "hollow victory" spoken of by this Court in *Swift & Co.* and by the Second Circuit in *Glaser*, Dayco's right to move again for attachment could have had meaning only if the defendant had property within the jurisdiction against which it could move. That this was indeed the fact appears abundantly from the district court decision in *Dayco*, e.g. App. A-30, 32, 31, but there is nothing here to indicate that once the defendants' property now subject to the TRO is gone, as defendants say it will be if the district court decision stands, the plaintiffs would ever again be able to find property of the defendants' that they could attach. In *Dayco*, on the contrary, the court found insufficient evidence to support plaintiff's claim that defendants' had transferred funds out of New York. *Id.*

In short *Dayco* denied attachment precisely because the plaintiff there was unable to submit proof to support his assertion under CPLR 6201(3) that "the defendant, with intent to . . . frustrate the enforcement of a judgment" had or was about to assign, dispose of, secrete or remove property from the state whereas the defendants here have explicitly declared such an intention to the court of appeals, thereby giving the plaintiff the right to an attachment not only under CPLR 6201(1) under which they originally moved but also under 6201(3).

Accordingly in this case there is not and could not have been any dispute of fact or finding adverse to the plaintiffs and correlative to *Dayco* in regard to the applicability of CPLR 6201(1). The district court did not purport to make any such finding in the order appealed from, App. A-4. It denied the attachment "on the ground that plaintiffs had not shown a probability of

success on the merits," App. A-6, an area expressly omitted from consideration by the court of appeals in making its December 3rd decision. App. A-2.

The facts found by the district court in *Dayco* that the defendants had not removed any of their property from the jurisdiction in order to frustrate a judgment and had not demonstrated any intent to do so made a practical and enforceable actuality of the right given to Dayco to renew its motion for attachment upon a showing of changed circumstances. This is a far cry from the factual unreality of the "right" to a renewed motion given to the plaintiffs by the district court here:

> [T]he parties [sic] may move upon 15 days notice for a temporary restraining order with an evidentary hearing to be arranged by the court . . .

A-8c. Since the Argentine defendants have explicitly announced that the plaintiffs would "not have property in New York against which to satisfy a judgment" if a stay of the district court order dissolving the temporary restraining order were to be denied, it requires no imagination to predict what they would do with any assets they might have in New York at some later date if they were given fifteen days notice of a motion by the plaintiffs for a temporary restraining order with a hearing to follow.

As noted, in *Dayco* the appellant argued that it was entitled to an attachment under CPLR 6201 (3) on the ground that the defendant "with intent to defraud his creditors or frustrate the enforcement of a judgment" had "assigned, disposed of, encumbered or secreted property, or removed it from the State, or [was] about to do so." As to this contention, there was, this court said in *Dayco*, an issue of fact. 705 F2d at 39. However, there is no corresponding or comparable issue here as to the applicability of CPLR 6201 although there are abundant issues of fact involved in the merits of the case, as demonstrated by the district court's complete denial of the defendants' summary judgment motion.

In regard to CPLR 6201(1), however it is uncontested that defendants are respectively a domiciliary of Argentina and an

Argentine corporation not qualified to do business in New York, thereby constituting a basis for a motion for attachment. It is equally uncontested that defendants have said that they will remove their property from New York if the restraining order is vacated and attachment denied. Although the plaintiffs did not seek attachment under CPLR 6201(3), as the plaintiff did in *Dayco*, this assertion by defendants establishes the plaintiffs' right to more for attachment under that provision as well as under CPLR 6201(1).

In *Dayco* as well as here, the court below held the district court decision not appealable because the only issue was "whether the district court correctly applied well settled rules of law to disputed facts." 18, *supra*, App. A-2. That analysis does not apply to this case because as has been shown here, there is no dispute of fact as there was in *Dayco*. On December 30, 1986, the district court granted a temporary restraining order, indicating that the law and facts shown by the plaintiffs justified such an order. On May 14, 1987, however, with the defendants' summary judgment papers before it, and without the plaintiffs having been afforded the opportunity to answer them, as the court acknowledged, it dissolved the TRO. App. A-9, 10. On this, there is no dispute, and as it is a principal basis for plaintiffs' appeal, it cannot, in view of the court of appeals' expression of no opinion on the merits of motion or case, App. A-2, have been considered by that court in dismissing the appeal.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit to review its order and opinion in this case.

Respectfully submitted,

ROBERT P. KNAPP, JR.
Counsel of Record for Petitioners
452 Fifth Avenue
New York, New York 10018
(212) 730-7870

Of Counsel:
ENGEL & MULHOLLAND

MARCH 1, 1988

87-1464

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON, JR.,

Petitioners,

– against –

ALICANTO, S.A. and WILLIAM H. SHAW,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROBERT P. KNAPP, JR.
Counsel of Record for Petitioners
452 Fifth Avenue
New York, New York 10018
(212) 730-7870

Of Counsel:
ENGEL & MULHOLLAND

February , 1988

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of December, one thousand nine hundred and eighty-seven.

P r e s e n t: HONORABLE WILLIAM H. TIMBERS,

HONORABLE THOMAS J. MESKILL,

HONORABLE GEORGE C. PRATT,

Circuit Judges.

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON, JR.,

Plaintiffs-Appellants,

v.

Docket No. 87-7456

ALICANTO, S.A. and WILLIAM H. SHAW,

Defendants-Appellees.

This is an appeal from an order of the United States District Court for the Eastern District of New York, Weinstein, *C.J.*, dissolving a temporary restraining order and denying plaintiffs-appellants' motion for an order of attachment.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The appeal is DISMISSED for lack of jurisdiction.

We have jurisdiction only over appeals from final orders. 28 U.S.C. § 1291 (1982). We have stated that orders refusing to

confirm attachments ordered *ex parte* under New York law are not appealable final orders, and in doing so we equated such orders with those, like the one in the instant case, that merely refuse to grant attachments. *See Dayco Corp.* v. *Foreign Transactions Corp.*, 705 F.2d 38, 40 (2d Cir. 1983). *See also* 9 J. Moore, B. Ward & J. Desha Lucas, Moore's Federal Practice ¶ 110.13[5] at 171 (2d ed. 1987) (order denying attachment ordinarily non-appealable). As in *Dayco*, the order here also lacks finality because it is subject to a renewed motion upon a showing of changed circumstances.

Moreover, we do not believe that this case falls within the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Appellants argue that the Supreme Court's application of *Cohen* in *Swift & Co. Packers* v. *Compania Colombiana del Caribe, S.A.*, 339 U.S. 684 (1950), obliges us to hold the order below to be appealable. In *Swift*, the Court held that an order vacating an attachment was appealable, *id.* at 689. But in *Dayco*, we distinguished orders denying or refusing to confirm orders of attachment, which are not appealable, from orders vacating attachments, which are. The instant case falls into the former category.

Furthermore, the *Dayco* Court also observed that both *Swift* and *Cohen* involved significant and unsettled questions of law that bolstered the argument for allowing an immediate appeal. In *Dayco*, as in the case before us today, the order appealed from merely applied settled law to disputed facts. *See Dayco*, 705 F.2d at 40. "[I]nterlocutory appeals of essentially factual questions are especially disfavored." *In re Committee of Asbestos-Related Litigants*, 749 F.2d 3, 5 (2d Cir. 1984) (citing *Dayco*, 705 F.2d at 40).

Dayco's interpretation of the collateral order doctrine governs the appealability of this order. We accordingly dismiss for lack of jurisdiction. We express no opinion on the merits of either the motion for order of attachment or the underlying case.

/s/ Wm. H. Timbers
William H. Timbers, U.S.C.J.

/s/ Thomas J. Meskill,
Thomas J. Meskill, U.S.C.J.

/s/ George C. Pratt
George C. Pratt, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON,

Plaintiffs,

– against –

ALICANTO, S.A. and WILLIAM H. SHAW,

Defendants.

CV-86-4321 (JBW)

ORDER DISSOLVING TEMPORARY RESTRAINING ORDER, DENYING MOTION FOR AN ORDER OF ATTACHMENT AND DENYING MOTION FOR REARGUMENT AND FOR A STAY PENDING APPEAL

Plaintiffs having moved by order to show cause dated December 30, 1986 for an order of attachment and for an *ex parte* temporary restraining order, and the Court having granted said temporary restraining order, and

Pursuant to said temporary restraining order the sum of $341,843.70 having been deposited with the Clerk of the Court in an account held by Citibank, Branch 51, 181 Montague Street, Brooklyn, New York 11201, and $38,016.32 having been restrained in accounts held at the Marine Midland Bank and the Bank of Boston International, and

The plaintiffs having submitted in support of the motion for an order of attachment the December 24, 1986 affirmation of Robert P. Knapp, Jr., counsel for plaintiffs; the August 18, 1986 affidavit of Spiro T. Agnew; the August 21, 1986 affidavit of

William H. Woolverton; the August 6, 1986 affidavit of James W. Green; and a memorandum of law, and

The Court having so ordered a stipulation of the parties on April 7, 1987 requiring defendants to submit their papers in opposition to said motion for an order of attachment (and in support of a motion for summary judgment) on or before April 24, 1987, and requiring plaintiffs to submit any responsive papers by May 15, 1987, and

The defendants having submitted in opposition to said motion for an order of attachment and in support of defendants' motion for summary judgment defendants' April 23, 1987 memorandum of law; the April 22, 1987 affidavit of Jeffrey G. Stark, one of the defendants' attorneys; the April 9, 1987 affidavit of Professor Alejandro Miguel Garro; the April 2, 1987 affidavit of Augustus P. Schneidau; the April 3, 1987 affidavit of John R. Hettinger; the April 21, 1987 affidavit of Kenneth A. Nelson; the April 22, 1987 affidavit of William H. Shaw; the transcripts of the April 2, 1987 deposition of plaintiff Agnew and the April 10, 1987 deposition of plaintiff Woolverton, and

Plaintiffs having moved for an extension of time to answer defendants' motion for summary judgment and having submitted the affirmation of Robert P. Knapp, Jr. dated May 8, 1987 and a memorandum of law in support of said motion, and

Defendants having opposed said motion for an extension and having submitted the May 13, 1987 letter of William J. Cunninham, III, one of the attorneys' representing defendants, opposing plaintiffs' motion for additional time to respond to defendants' motion for summary judgment and requesting that plaintiffs' motion for an order of attachment be decided upon the papers theretofore submitted by plaintiffs and defendants, and

Plaintiffs having submitted a May 13, 1987 letter of plaintiffs' counsel, Robert P. Knapp, Jr., requesting that plaintiffs be given until June 19, 1987 (from May 15, 1987) to answer defendants' motion for summary judgment and opposing defendants' request that the attachment motion be decided upon the papers theretofore filed, and

The Court having heard oral argument on May 14, 1987 and having issued an oral decision finding that plaintiffs had not shown good cause to extend the hearing date on the December 30, 1986 temporary restraining order as required by F.R.C.P. 65(b) and that plaintiffs had failed to show a probability of success on the merits of their claims as required by CPLR 6212, and

Plaintiffs having moved for reargument of the Court's decision vacating the temporary restraining order and denying plaintiffs' motion for an order of attachment, or in the alternative, for a stay pending appeal, and having submitted a memorandum of law and the affirmation of Robert P. Knapp, Jr., dated May 19, 1987 and the affidavit of William H. Woolverton, Jr. sworn to May 19, 1987 in support of said motion, and defendants having submitted the affirmation of Jeffrey G. Stark, Esq., dated May 26, 1987 and a memorandum of law in opposition to said motion, and in support the affirmation of Robert P. Knapp, Jr. dated May 27, 1987 and the affidavit of William H. Woolverton, Jr. dated May 26, 1987.

NOW, upon motion of Meyer, Suozzi, English & Klein, P.C., it is, orderd that the motion for reargument is granted, and upon the original motion and all subsequent proceedings, it is

ORDERED, that plaintiffs' motion for an extension of the hearing date on their *ex parte* temporary restraining order is denied on the ground of plaintiffs' failure to show good cause therefore as required by F.R.C.P. 65(b), and because no good cause has been shown for an extension; and it is further

ORDERED, that the parties may move upon fifteen days notice for a temporary restraining order with an evidentiary hearing to be arranged by this court, it is further

ORDERED, that the plaintiffs' motion for an order of attachment is denied, with leave to renew upon a showing of further merit, on the ground that plaintiffs have not shown a probability of success on the merits as required by CPLR 6212; and it is further

ORDERED, that the temporary restraining order contained in the order to show cause dated December 30, 1986, a copy of which has been served upon the Marine Midland Bank and the Bank of Boston International, is vacated and is deemed null and void as of the date of this order as to those persons and any other person served with a copy of said order; and it is further

ORDERED, that the Clerk of the Court is directed to release to defendant William H. Shaw the sum of $341,843.70 plus interest thereon, which is currently held in an Insured Market Rate Account at Citibank Branch 51, located at 181 Montague Street, Brooklyn, New York 11201, pursuant to this Court's February 26, and March 10, 1987 orders, and that said monies shall be released in the form of a Citibank check payable to the order of Meyer Suozzi, English & Klein, P.C., as attorneys for William H. Shaw; and it is further

ORDERED, that plaintiffs' undertaking filed in connection with the December 30, 1986 temporary restraining order shall continue in full force and effect and shall be available to pay to defendants all costs and damages, including reasonable attorney's fees, sustained by reason of the temporary restraining order; and it is further

ORDERED, that plaintiffs shall serve and file their papers in opposition to defendants' motion for summary judgment on or before June 19, 1987, with defendants' reply, if any, to be served and filed on or before July 2, 1987, with the matter returnable before this Court on July 7, 1987 at 9:30 a.m., 225 Cadman Plaza East, Brooklyn, New York, Courtroom 10; with leave to either party to apply for further extensions of any of these dates by letter; and it is further

ORDERED, that plaintiffs' motion for a stay pending appeal is granted for 10 days to permit an application to the Court of Appeals for a further stay (the court expressing no view as to the disability of an intermediate appeal).

May 27, 1987

/s/ Jack B. Weinstein

U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- x

SPIRO T. AGNEW & WM. H. WOOLVERTON JR.,

Plaintiff,

– against –

ALICANTO S.A.
WM. H. SHAW,

Defendant.

---------- x

CV 86 4321

United States Courthouse
Brooklyn, New York

May 14, 1987
9:30 o'clock a.m.

TRANSCRIPT OF CIVIL MOTION
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiff: ROBERT P. KNAPP, JR., ESQ.

For the Defendant: MEYER SUOZZI ENGLISH & KLEIN

WILLIAM J. CUNNINGHAM III,
of counsel

Court Reporter: Marsha Diamond
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE COURT: Yes, I will be glad to hear you gentleman.

MR. KNAPP: Your Honor, this is an application by the plaintiffs for an extension of time to answer the defendant's motion for summary judgment. This pile of papers represents the motion for summary judgment.

THE COURT: If you think you need more time I will give it to you but I have a problem with what happens to the money that has been seized or at least not seized; what have you done to it?

MR. CUNNINGHAM: Subject to restraint, Judge.

THE COURT: Yes. What about the $400,000?

MR. CUNNINGHAM: Three hundred seventy thousand, Judge.

THE COURT: What are we going to do? We can't keep the man tied up.

MR. KNAPP: Well, Your Honor, that was their application. Your Honor will recall back when we had the previous conference before you I was for bringing that motion on, the motion for attachment on at that time. The defendants, however, requested that it be consolidated with our motion for summary judgment.

THE COURT: Well, I will give you all the time you need on the motion but I am not going to keep the money tied up. Is there a bond in the case.

MR. CUNNINGHAM: No, Judge, it is all cash. I am sorry, yes.

MR. KNAPP: We have bonded it yes.

THE COURT: I am going release the money. What are you going to do about the bond? I don't want to keep the bond.

I think you just should waive all liability and close this part of the case out; otherwise we will have the bond hanging over.

MR. CUNNINGHAM: The bond is used to secure defendants for their assets being tied up on this too. So I don't think there is any need for the bond if the assets are released.

THE COURT: Bond is released. So are the funds. How much time do you want?

MR. KNAPP: I wanted June 19, but I would like to submit –

THE COURT: Take as much time as you want.

MR. KNAPP: On the attachment I would like to submit something.

THE COURT: It is on a TRO now; isn't it?

MR. CUNNINGHAM: Yes.

MR. KNAPP: Yes, Your Honor.

THE COURT: Now, they are not consenting to an extension, as I understand their papers.

I am not going to continue it. I don't believe, based on the papers I have seen there is a substantial basis for the case as it now stands; and I don't think it is fair to hold this man's money during this period while you need more time.

MR. KNAPP: Well, it was their request that the attachment be put over until this motion for summary judgment was decided.

THE COURT: I understand but it is now being delayed at your request. It seems to me that fairness requires that both sides give something. They will have to give time and you will have to give the money.

THE COURT: I just don't think it is fair to keep their money tied up.

All right. Submit an order on it. You can have all the time you want. I don't want to pressure you. It is a difficult case. They submitted a lot of papers. I certainly am not going to lean on you.

How much time do you want?

MR. KNAPP: I ask for June 19.

THE COURT: Fine. You can have it.

MR. KNAPP: There is another matter. I take it, it goes before the magistrate. I noticed the deposition of the defendants but they have refused to appear.

THE COURT: Why aren't they appearing?

MR. CUNNINGHAM: They are not appearing in connection with the motion for summary judgment because when we were before the magistrate to set up discovery on this matter as well as briefing schedule, the only discovery that was requested was by defendants. We went ahead and deposed.

THE COURT: Have them appear. I want their deposition given.

MR. CUNNINGHAM: My only objection is that we are now in the context of a motion for summary judgment. I think the case law and the rule requires that if Mr. Knapp requires their testimony —

THE COURT: I am telling you to give it to them. Obviously it may be critical to a motion for summary judgment. He is entitled to have it; otherwise he is going to respond by saying he can't respond. I mean he is a good lawyer and so are you. I guess that is what is going to happen. I am not a very good lawyer but that is what happens.

Give him his deposition.

MR. CUNNINGHAM: We just asked the one witness that Mr. Knapp has asked to be deposed. It is a party who resides down in Argentina. Periodically he travels to the United States.

THE COURT: Whether is he going to be here next?

MR. CUNNINGHAM: He is probably not going to be here until later this month. I don't have the exact date.

THE COURT: If you need more time on the motion you can have it. Arrange it.

Thank you gentleman.

THE CLERK: We have to make it June. Was June the date for filing your papers.

MR. KNAPP: Yes.

MR. CUNNINGHAM: I would ask for a week to reply and then schedule.

THE CLERK: July 1 is the return date.

THE COURT: Thank you very much, gentlemen. You better submit an order.

MR. CUNNINGHAM: I will Judge.

THE COURT: Have it or you will have the attachment and bond problem.

MR. CUNNINGHAM: Yes. It will be done today.

(Proceedings concluded.)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of January one thousand nine hundred and eighty-eight.

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON, JR.,

Plaintiffs-Appellants,

v.

ALICANTO, S.A. and WILLIAM H. SHAW,

Defendants-Appellees.

No. 87-7456

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, Spiro T. Agnew and William H. Woolverton, Jr.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith

Elaine B. Goldsmith,
Clerk

Agnew et al.

v.

87 - 7456

Alicanto et a.

Docket Number

Use short title

NOTICE OF MOTION

state type of motion

for Stay or recall of mandate

* * EXTRANEA NOT REPRODUCED * *

Judge or agency whose order is being appealed:

Honorable Jack B. Weinstein, U.S. District Judge, Eastern District of New York

Brief statement of the relief requested: Stay or recall of the mandate because court's order denying petition for rehearing, filed January 21, 1988, postmarked January 22, 1988 was received be petitioners' attorney only today, January 28 1988, leaving no time for possible application to the United States Supreme Court for stay pending petition for certiorari.

By *(Signature of attorney)*	**Appearing for:** *(Name of party)*	*Appellant or Petitioner:* ☒ *Plaintiff* ☐ *Defendant* *Appellee or Respondent:* ☐ *Plaintiff* ☐ *Defendant*
/s/ Robert P. Knapp Jr.	January 28, 1988	
Signed name must be printed beneath	**Date**	

ORDER

Kindly leave this space blank

Construing appellants' motion filed 1/28/88 as one for a stay of the mandate pending application for a writ of certiorari pursuant to FRAP 41(b), the motion is *granted* and appellants are directed to comply with Rule 41(b).

/s/ William H. Timbers
William H. Timbers, USCJ (by TJM)

/s/ Thomas J. Meskill
Thomas J. Meskill, USCJ

/s/ George C. Pratt
George C. Pratt, USCJ (by TJM)

2/3/88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAYCO CORP.,

Plaintiff,

– against –

FOREIGN TRANSACTIONS CORP., et al.,

Defendants and Third-Party Plaintiffs,

– against –

RICHARD J. JACOB, et al.,

Third-Party Defendants.

MEMORANDUM OPINION AND ORDER

82 Civ. 3354 (MJL)

APPEARANCES:

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BY: LEONARD GARMENT, ESQ.
SIDNEY DICKSTEIN, ESQ.
JUSTIN D. SIMON, ESQ.
HOWARD SCHIFFMAN, ESQ.
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SHEA & GOULD
Attorneys for Defendants/Third-Party Plaintiffs
330 Madison Avenue
New York, New York 10017

BY: MILTON GOULD, ESQ.

MARY JOHNSON LOWE, D. J.

INTRODUCTION

Plaintiff Dayco Corporation ("Dayco") commenced this litigation on May 24, 1982 and applied for an *ex parte* order of attachment of defendants' assets on June 11, 1982. After a hearing the same day, the order was granted.[1] Plaintiff thereafter moved to confirm the attachment,[2] for which motion oral argument was heard during prolonged sessions on August 4 and August 24, 1982. In addition to their oral presentations, the parties have supplied the Court with a number of affidavits and well-presented supporting and opposing briefs. After due deliberation, and for the reasons stated below, the Court denies plaintiff's motion to confirm.

---

[1] At the time, the Court approved the posting of a bond in the amount of $2.5 million, which has been undertaken by plaintiff.

[2] Under New York law, a party who has obtained an order of attachment without notice must move to confirm that order within five days after levy. N.Y. CPLR § 6211(b).

FACTS

Dayco is a Delaware corporation with primary place of business in Dayton, Ohio. Complaint, ¶5. It is engaged, *interalia*, in the manufacture and selling of "rubber and plastic component parts, including V-belts and hose," *id.*, which products are sold internationally. Dayco alleges that, over the course of the past three years, the individual and corporate defendants[3] participated in a scheme to defraud the company of millions of dollars in advance commissions for nonexistent commercial orders from foreign trade organizations in the U.S.S.R. *Id.*, ¶¶12-22. Based on this scheme, and Dayco's resulting manufacture of large quantities of hoses and belts to fill the fictitious orders, *id.* ¶ 16, Dayco asserts claims of fraud, breach of contract, breach of fiduciary duty, and violation of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and the federal civil RICO statute, 18 U.S.C. § 1962.[4]

The Reich defendants, in their answer and counter-claims, admit to some of the conduct charged by plaintiff. It is contended by defendants that, commencing in September of 1979, officers of Dayco, including the president, Mr. Jacob, entered into an agreement with the Reich defendants

> pursuant to which, and at the specific request and urging of Jacob, Mrs. Reich agreed to furnish Dayco with orders (the "Anticipated Orders") for Dayco products

---

[3] Defendants are the Foreign Transactions Corporation ("FTC"), Trachem Company, Limited ("Trachem"), Edith Reich, Brigette Jossem-Kumpf, Judith A. Reich, and Michael Reich (hereinafter referred to collectively as the "Reich defendants"). Edith Reich is the director, president, and a shareholder of FTC and Trachem.

[4] Plaintiff seeks damages against the defendants, jointly and severally, of $25,000,000 on Claims I and II; $13,000,000 on Claim III; $25,000,000 on Claims IV, V and VI; punitive damages as to Claims V and VI; the imposition of a constructive trust on all commissions and payments to defendants plus all profits and proceeds therefrom. Additional injunctive relief and an award of attorneys' fees is also requested.

by USSR foreign trade organizations that Mrs. Reich anticipated would be, but had not in fact been, placed by such organizations. Jacob told Mrs. Reich that if she provided Dayco with the Anticipated Orders, Dayco would be able to keep its plants open and not lay off workers.

Jacob stated to Mrs. Reich that, when actual orders from the USSR materialized (the "Actual Orders"), they could be substituted for the Anticipated Orders that she agreed to furnish to Dayco, and assured her that there would be no problem for anyone as a result of the Jacob Agreement.

Under the Jacob Agreement, Jacob agreed to pay certain of the defendants advance commissions based on the Anticipated Orders. It was further agreed that these advance commissions would be applied against commissions earned by certain of the defendants when the Actual Orders were, in fact, placed by the USSR foreign trade organizations.

As part of the Jacob Agreement, pursuant to which certain of the defendants were paid approximately $13,000,000 in advance commissions, Jacob demanded and received $3,000,000 from certain of the defendants, which sum was paid to Jacob in cash and in money transfers in foreign countries, including Switzerland.

In order to conceal from Dayco's internal comptrollers and external auditors the fact that the Anticipated Orders were not firm orders that had been placed by USSR foreign trade organizations, Jacob, Gordon and Curry demanded that documentation (the "Documentation") be prepared evidencing that the Anticipated Orders were Actual Orders to that such Documentation could be furnished by them to such accounting personnel. The Documentation was prepared in late 1980 by certain of the defendants and by Stuart A. Jackson ("Jackson"), one of FTC's attorneys at the time. In connection with his role in

> effectuating the Jacob Agreement, Jackson demanded, and was paid in excess of $1,000,000 by certain of the defendants.

Answer of Reich defendants, ¶¶99-102, 104.

On the basis of the facts believed by it to be true, plaintiff moved an *ex parte* order of attachment on June 11, 1982, alleging that

> the defendants, with the intent to defraud Dayco or frustrate enforcement of a judgment that might be rendered in Dayco's favor, have secreted or removed property from the state or are about to do these acts.

Plaintiff's Memorandum of Law at 2. Plaintiff also alleged the following jurisdictional facts:[5]

> 1. That there is an action in which Dayco is entitled to a money judgment (See Affidavit of Plaintiff (Ernest F. Dourlet));
>
> 2. that it is probable that the plaintiff will succeed on the merits (See Affidavit of Plaintiff and Affidavit of John Huhs, Esq., Special Counsel to Dayco);
>
> 3. that one or more grounds for attachment provided in §6201 exists (See Affidavit of Jeffrey M. Johnson, Esq.); and
>
> 4. that the amount demanded from the defendants exceeds all counterclaims known to Dayco (See Affidavit of Plaintiff).

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[5] The predicate jurisdictional elements are set forth in N.Y. CPLR § 6212(a):

> On a motion for an order of attachment, or for an order to confirm an order of attachment, the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.

DISCUSSION

Under the heading of "Provisional and Final Remedies and Special Proceedings", Fed. R. Civ. 64 provides in relevant part:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available *under the circumstances and in the manner provided by the law of the state in which the district court is held*, existing at the time the remedy is sought . . . . [Emphasis added]

The applicable law of New York appears in N.Y. CPLR § 6201(3) *et seq.* Subsection three states that a plaintiff may obtain an attachment where "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts [.]" N.Y. CPLR § 6201(3) (McKinney Supp. 1964-79).

If a party is successful in obtaining an attachment without notice pursuant to N.Y. CPLR § 6211(a),[6] he must move to

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[6] An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount to be secured by the order of attachment including any interest, costs and sheriff's fees and expenses, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the amount specified in the order of attachment.

confirm the attachment pursuant to § 6211(b),[7] at which time defendant(s) may produce evidence to demonstrate that there is no proper statutory basis for the attachment. New York law further provides:

> § 6223. Vacating or modifying attachment
>
> (a) Motion to vacate or modify. Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court may give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action.
>
> (b) Burden of proof. Upon a motion to vacate or modify an order of attachment the plaintiff shall have the burden of establishing the grounds for the attachment, the need for continuing the levy and the probability that he will succeed on the merits.

N.Y. CPLR § 6223 (McKinney Supp. 1964-1979). Thus, whether the garnishor is moving to confirm an attachment or the defendant is moving to vacate the attachment, the burden rests with the former to establish the basis for the attachment. In this case,

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[7] An order of attachment granted without notice shall provide that within a period not to exceed five days after levy, the plaintiff shall move, on such notice as the court shall direct to the defendant, the garnishee, if any, and the sheriff, for an order confirming the order of attachment. If plaintiff fails to make such motion within the required period, the order of attachment and any levy thereunder shall have no further effect and shall be vacated upon motion. Upon the motion to confirm, the provisions of subdivision (b) of section 6223 shall apply. An order of attachment granted without notice may provide that the sheriff refrain from taking any property levied upon into his actual custody, pending further order of the court.

the rule requires that plaintiff show that the defendants did or are about to assign, dispose of or encumber their assets found in this jurisdiction with intent to defeat a judgment against them.

a pre-judgment attachment cannot be ascertained or proven with certainty. Each case must be judged on its own merits:

> What constitutes an intent to defraud creditors usually will depend on the facts and circumstances of each case; direct proof is almost never available. Although the cases abound with broad statements, they do not yield a standard capable of precise application. As a general rule, the court will approach the question by presuming that the defendant is not engaged in any fraudulent scheme so that any conduct consistent with honesty or good faith rarely will support an inference of fraud. On the other hand, the plaintiff need show only a probability of fraud to establish a prima facie case. He need not negative all of the possible honest motivations for the defendant's conduct; once he establishes that it is reasonable to infer an intention to defraud from the defendant's conduct, the burden shifts to the defendant to explain his action.

7A Weinstein, Korn & Miller, *New York Civil Practice* ¶ 6201.12 at 62-33 (1977) (footnotes omitted). To make out a prima facie case, therefore, does not require actual proof. Fraudulent intent may be established by an "unexplained disappearance of a substantial portion of the defendant's assets." *Id.* at 62-32.[8] However:

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[8] Weinstein, Korn and Miller further write:

> CPLR 6201(3) does not require that any specific portion of the defendant's assets to be transferred or secreted before an order of attachment can be granted. Presumably, the transfer or disappearance of an abnormal amount of property is all that is necessary. Care must be taken, however, that an attachment under
>
> *(Footnote continued)*

> Proof of assignment, disposition, secretion or removal of property or a likelihood that any one of these acts is imminent is not enough; proof of an intent to defraud creditors, or intent or [sic] frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, is an independent prerequisite for attachment under CPLR 6201(3). Some of the more relevant factors in deciding whether given acts were undertaken to defraud creditors or frustrate the enforcement of a judgment are the nature of the relationship between the transferee and the defendants, the defendant's financial condition at the time of the transfer and the adequacy of the consideration paid to the defendant.

Id. at 62-35 (footnotes omitted).[9]

In the present case, plaintiff relies on four factors to establish the necessary inference of intent to defraud or to frustrate the judgment:

1. "Mrs Reich is . . . a confessed swindler and fabricator of documents." Plaintiff's Third Supplemental Memorandum of Points and Authorities at 6.

CPLR 6201(3) is not resorted to as a means of interfering with the defendant's ability to make transfers in the ordinary course of his business.

7A Weinstein, Korn & Miller, *New York Civil Practice* ¶ 6201.12 at 62-32-33 (1977) (footnotes omitted).

[9] Further, as to intent, the authorities write:

> If there has been no disposal or secretion at the time the order is sought, the plaintiff's task is more difficult; it is much harder to prove that the defendant intends to do one or more of the proscribed acts in the future. The plaintiff can meet this burden by showing that the defendant has made declarations indicating an intention to dispose of his property or that the defendant has completed the preliminary steps for doing so.

Id. at 62-32.

2. Defendants have failed to explain the absence of funds in this jurisdiction traceable to the admitted $13 million received as advance commissions from Dayco. *Id.* at 8.

3. FTC, one of the two corporate defendants controlled by Mrs. Reich, which is located in New York, "is insolvent – certainly unable to pay the substantial tax liability that has been incurred." *Id.* at 7.

4. "Mrs. Reich now admits to accumulating large sums of cash in safe deposit boxes, claims to have made payoffs to Dayco officials with monies obtained from secret businesses and bank accounts in Switzerland, and refuses to reveal the amount or location of her assets either in the State of New York or abroad." *Id.*

Each of these factors will be examined below with respect to the rebuttal evidence brought forward by defendants. While the Court agrees with plaintiff that it has made out an adequate, prima facie showing under § 6201(3), it also finds that defendants' evidence, explaining the relevant circumstances by way of personal knowledge affidavits and records has sufficiently rebutted the inference of intent to secret assets which could be used to satisfy judgment in favor of plaintiff.

1. *Prior Bad Acts*

One of plaintiff's primary theories is the defendants' prior, admittedly illegal conduct giving rise to the necessary inference of future intent under § 6201(3).[10] For example, counsel argued:

> What's sufficient becomes compelling in a rather unusual degree by the admissions o4 [sic] Mrs. Reich, careful, judicious admissions repeated in her testimony that she was engaged in criminal activity, that she took part, according to her allegations, in a plan that can

[10] *See* Transcript of Hearing, dated August 4, 1982 at 5, 6, 34, and 40 (hereinafter cited at "Tr. 1 - ____"); Transcript of Hearing dated August 24, 1982 at 11, 14 (hereinafter cited as "Tr. 2-____").

> be carefully characterized as a swindle, that she, according to her allegations, paid large kickbacks to the president of the company — I might add that he denies this, but these are her allegations — and to two senior employees of the company.
>
> That in the course of concealing this transaction, she alleges under oath, that she paid her attorney $1 million to fabricate documents so as to conceal the wrongdoing from the company auditors and also to mislead public auditors and the regulatory agencies.
>
> We have, in addition, the assertion that the moneys were paid from the safe deposit boxes to the recipients of the alleged kickbacks, and that these moneys were placed in the safe deposit boxes in part from FTC funds.

Tr. 2-11 to 12. From these alleged admissions, counsel argues that it is reasonable to assume that defendants *presently* intend to defraud and frustrate a judgment in its favor.[11]

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[11] This inference is grounded on the conduct alleged in the complaint, however plaintiff concedes that a showing based solely on the complaint is insufficient under the statute as amended in 1977. *See* Tr. 1-5, 7, 35 and 37. Plaintiff argues that there is sufficient nexus between the *admitted* prior misconduct and a present scheme to secrete or encumber assets to support the inference required under § 6201. Plaintiff argues:

> This is emphatically not for the purpose of linking *plaintiff's allegations* to its request for an order confirming the attachment but rather putting *Mrs. Reich's sworn admissions and assertions* into context. Defendants wrongly accuse Dayco of returning to the pre-1977 practice that permitted attachments solely on the basis of allegations of fraud. In doing so they gloss over the substantial evidence presented by plaintiff and admitted to by Mrs. Reich to satisfy the Court that grounds for attachment exist apart from plaintiff's allegations.

Plaintiff's Second Supplemental Memorandum, p. 10, fn. 6.

Counsel for defendant contends that the statute [6201] was amended[12] just to preclude the use of claims of fraud alleged in the complaint, as the predicate for an inference of fraudulent intent to remove assets to frustrate the judgment. He argues that plaintiff must show, independently of the allegations in the complaint, that the secretion or *removal* of assets was done with intent to frustrate a potential judgment. Even though his client, counsel states, had admitted acting in concert with various officers of plaintiff corporation to submit false documentation in order to justify the commissions paid, his client denies that she transferred or secreted the proceeds with intent to defeat a possible judgment. The defendant Reich maintains:

> [T]he fact remains that no assets have been removed from the State of New York and the defendants have done nothing to frustrate the enforcement of a judgment that might be rendered in this case. This fact can also be demonstrated by referring to the list of defendants' property which plaintiff seeks to attach . . . . As shown below, despite the institution of this action on May 24, 1982, none of the [defendants'] real or personal property . . . . has been assigned, disposed of, encumbered, secreted or removed form the State of New York.

Affidavit of Edith Reich, sworn to on June 14, 1982, ¶6.

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[12] *Weinstein Korn & Miller, supra*, note 8, §6201.17 at 62-37 observes that paragraphs 5, 6 and 8 of former section 6201 were amended.

> Effective September 1, 1977, these provisions were repealed on the ground that the statute indulged in the unproven assumption that defendants charged with the stated wrongs were more likely to indulge in conduct frustrating the enforcement of a future judgment in plaintiff's favor than defendants in other cases. As noted by the Judicial Conference Report to the 1977 Legislature, [cite omitted] the provisions were of dubious constitutional validity and there was no reason why a defendant charged, for example, with conversion was more likely to tamper with his property than one sued for assault, wrongful death or negligence.

See Reeder v. *Mastercraft Electronics Corporation*, 297 F.Supp. 815, 817 (S.D.N.Y. 1969) for statement of former law.

It thus appears and the parties agree, that the above "admissions" of Mrs. Reich in and of themselves, do not give rise to the inference that she harbors a present intent to frustrate a judgment in this case, if one is obtained by plaintiff. Although plaintiff has alleged in its complaint and during oral argument that Reich has undertaken activities which would directly provide a link between past misconduct and present alleged fraudulent intent, those allegations of past acts cannot bolster an otherwise insufficient showing of a continuing plan to secrete assets.

2. *Disappearance of Funds*

The most persistent argument made by plaintiff to support an inference of fraud is that, while more than $13 million was paid to defendants as advance commissions over a period of three years, at the commencement of this action, the money was not to be found in defendants' New York bank account and other assets.[13] Plaintiff maintains that such a large amount of money could not have been used in the ordinary course of business and therefore must have been taken from the jurisdiction in order to defeat any judgment against them. *See, e.g.*, Tr. 1-6, 8, 10; Tr. 2-6, 8 to 9.

Following a preliminary indication from the Court that absent any rebuttal from defendants, the record could support a finding that the funds had been taken fraudulently from the jurisdiction, defendants procured the assistance of an outside expert, directed to review the relevant records for evidence of fraud. *See* Tr. 1-32. The defendant's expert, Sidney E. Connor, employed by the Criminal Investigation Division of the Internal Revenue Service as a Special Agent for 27 years, submitted an affidavit to the Court detailing his analysis, for the period October 1, 1979 to December 31, 1981, of the financial records of the defendants Reich, FTC and Trachem.[14] The affidavit concludes:

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[13] *See, e.g.*, Tr. 1-3, 10; Tr. 2-6, 8 to 9.

[14] Defendants's financial transactions, Connor affidavit, Appendix "A" is attached hereto and made a part hereof.

> 18. I have not found any evidence which leads me to the conclusion that there has been a deliberate plan to dispose of funds in an attempt to defeat the claims of Dayco or any other creditor.

Plaintiff argues in its Supplemental Memorandum at p. 7:

> The plaintiff is, of course, not able to show whether over $13,000,000 was used in the normal course of business or, more realistically, what really happened to the money. The whole notion of the grounds for attachment — removal or secretion of assets — is that the funds have fled the state and cannot be accounted for. The case law solves this problem in holding that where "the nature of the transaction is such that plaintiff cannot furnish direct evidence but does set forth such facts as a reasonably prudent person would accept as prima facie proof, that is sufficient to withstand the motion on defendants' proof unless the latter is so convincing as to compel a contrary conclusion." *Atlantic Raw Materials* v. *Almarex Products*, 154 N.Y.S.2d 993, 996 (Sup.Ct. 1956.).

Plaintiff's reliance on the general statement of law made by the Court in *Atlantic Raw Materials* v. *Almarex Products* is subject to the *caveat* noted *supra* at p. 10, "although the cases abound with broad statements, they do not yield a standard capable of precise appreciation." The Court in *Atlantic Raw Materials* was ruling upon an application to vacate an attachment which had been previously ordered by another court.[15] The original order was based *inter alia* upon a finding that the corporate defendant had made specified transfers of money into foreign bank accounts and its managing agent had told plaintiff that if plaintiff did not accept defendant's offered settlement,

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[15] Plaintiff's citation in its memorandum was to the second case, the first case, denying the motion to vacate as to the corporate defendant and granting the motion as to the individual defendant is found in 154 N.Y.S.2d 998.

the transfer of funds abroad would result in the corporate defendant having no assets with which to satisfy plaintiff's judgment *Atlantic Raw Materials* v. *Almarex Products*, 154 N.Y.S.2d 998 1001 (Sup. Ct. 1956). It is instructive to note that the court held

> The affidavit, however, throughout refers solely to the transfer of corporate property and is devoid of any statement showing a like transfer by the individual defendant of his own property. As to the individual defendant, therefore, the attachment cannot stand on either ground on which it was granted.

Id. at 1001.

The quotation relied upon by the plaintiff herein, was based upon the conclusion of the Judge at Special Term, on the second application to vacate the attachment, that the affidavits submitted by the defendant corporation were so hazy as to constitute insufficient evidence to dispel the finding of fraudulent transfer made by the court in the original proceedings.

The facts in the instant case are not comparable to those found by either the first or second court to consider the *Atlantic Raw Materials* attachment. In the present case there has been no evidence adduced that these defendants transferred funds from this jurisdiction with the expressed intent to frustrate a judgment which may be rendered in favor of plaintiff. The Connor affidavit, this Court finds, sufficiently refutes plaintiff's allegation of transfer of funds with the required statutory intent thereby shifting the ultimate burden of proof onto the plaintiff.

This Court further notes that plaintiff's insistent question "what happened to the $13,000,000 dollars" may be the appropriate question in a supplementary proceeding to enforce a judgment after trial but it is not the essential question on a motion to vacate an attachment - here the statute posits the querry - has plaintiff proven by a preponderance of the credible evidence that the defendant transferred its assets out of this jurisdiction in order to frustrate a potential judgment against it?

The second defect in plaintiff's argument is the assertion:

> It is also well settled law that in determining whether plaintiff has sustained its burden " 'the court must give the plaintiff the benefit of all the legitimate inferences that can be drawn from the stated facts.' " *Nat. Bank & Trust Co., Etc. v. J.L.M. Intern*, 421 F.Supp. 1269, 1272 (S.D.N.Y. 1976).[16]

Reliance on *Nat. Bank & Trust Co.* is misplaced. That court made the above cited ruling in a case arising under New York's pre-1977 attachment law. It was in reference to the burden upon plaintiff to prove a prima facie case in support of the complaint upon which an attachment is based. That issue is irrelevant to the issue here under discussion *i.e.* defendant's intent to remove or secrete assets so as to frustrate a judgment. *Brezenoff v. Vasquez*, 433 N.Y.S.2d 553 (Sup. Ct. 1980).

The Appellate Division of the Supreme Court of the State of New York in *Eaton Factors Co. v. Double Eagle Corp.*, 17 A.D.2d 135, 232 N.Y.S.2d 901, 903 (1962), addressing a claim of secretion of assets under former Civil Practice Act §903, subdivision 3 explained:

> In any event, the question here is whether or not there has been a sufficient showing of the existence of a fraudulent intent accompanying the alleged overt acts of the appellants. The mere removal or assignment or other disposition of property is not ground for attachment. There must coexist an intent of the debtor to defraud his creditors. From disposition of the property no presumption of intent to defraud arises. Such intent must be proved, and the facts relied upon to prove it must be fully set out in the moving affidavits. (10 Carmody-Wait, New York Practice 51.)
>
> [2,3] "Fraud cannot be inferred; it must be proved" (cites omitted). The fact that the affidavits in support

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[16] Plaintiff's Supplemental Memorandum at p. 7.

> of an attachment contain allegations raising a suspicion of an intent to defraud is not enough; (cites omitted) it must appear "that such fraudulent intent really existed in the mind of the defendants, and not merely in the ingenuity of the plaintiffs". (cites omitted) Thus, fraud is never presumed by a mere showing of the liquidation or disposal by a debtor of its business assets (*Nolan* v. *Louis Workman Co., Inc.*, 146 Misc. 99, 100, 261 N.Y.S. 534, 535, and cases cited). Here, too, the appellants are not to be deemed chargeable with fraud merely because, in connection with the liquidation of the corporate trucking business, they received a substantial sum in consideration of a limited agreement by them, as individuals, to refrain from engaging in such business. And also, here, the requisite showing of a fraudulent intent on the part of the appellants is not sufficiently made out by the alleged statements of certain of them to plaintiff to the effect that they had sold "out all of our assets' and that the plaintiff's judgment would be uncollectible. There was here no showing of a secreting or disposal of any particular assets of the appellants with intent to defraud their creditors.

See Reeder v. *Mastercraft Electronics Corporation*, 297 F.Supp. 815, 818-819 (S.D.N.Y. 1969); 297 F.Supp 820, 821 (S.D.N.Y. 1969); *Ester Lauder, Inc.* v. *Juda*, N.Y.L.J., Aug. 17, 1979 at p. 4 col.2 (Sup. Ct. 1979); *Banco Agricola y Pecuario* v. *Jiminez Export Corp.*, 97 N.Y.S.2d 437, 440 (Sup. Ct. 1950), *Wildman* v. *Van Gelder*, 14 N.Y.S. 914 (Sup. Ct. 1891).

The Court finds from all of the evidence and arguments that there has not been a sufficient showing of secreting or transfering funds so as to sustain plaintiff's burden of proof under §6201(b). While Mrs. Reich has admitted that she received commissions for fictitious orders and that she and her deceased husband paid bribes to others in execution of the fraudulent scheme alleged, these admissions are appropriate evidence on trial of the underlying cause of action but do not raise an inference that

because Mrs. Reich may have defrauded plaintiff in the past she has removed her assets to frustrate a potential judgment. See footnote 12, *supra*.

Although this Court finds that the affidavits submitted for the *ex parte* order of attachment were sufficient for that purpose and to shift the burden of rebuttal to defendant, the ultimate burden of proof under the statute remains at all times with the plaintiff.

This Court is persuaded that defendants have met their burden with a sufficient showing that the funds were used in the ordinary course of business. *See* Tr. 1-3, 26, 27, 32, and 37, and not to frustrate the enforcement of a judgment if one is obtained.

3. *Insolvency*

Although plaintiff has painted a picture of defendant FTC as a company "stripped clean" by Mrs. Reich, Tr. 2-8 to 9, the record does not support a finding that that corporation was failing at the time this lawsuit was commenced. Defendants have come forward with evidence to show that isolated overdrafts of bank accounts occurred as a normal part of the business, such that any given deficit would be an unreliable indicator of the company's soundness. The Court also rejects, as overly speculative, the theory that the large size of some of the expenditures of the defendant corporations is sufficient proof of phantom movement of funds or secretion of assets abroad. Defendants have demonstrated that money flow into this jurisdiction equalled or exceeded that transferred to England.

In summary, the record with respect to the financial stability of Mrs. Reich's business does not give rise to an inference of intent to secrete assets on the part of defendants.

4. *Safe Deposit Boxes*

Plaintiff finally alleges that Mrs. Reich and the other defendants participated in a conspiracy, which included the transfer of funds to safe deposit boxes and Swiss bank accounts in order to disguise the transfers. *See* Tr. 2-35. These allegations are countered by denials by Mrs. Reich. The suggested inference of present intent to defraud also is belied by Mrs. Reich's willingness now to make public the scheme in which she allegedly participated with plaintiff corporate officials.[17] In addition, it must be pointed out that plaintiff's ambiguous and "sketchy" evidence with respect to the Swiss Banks and European transfers does not show that Mrs. Reich is likely to engage in acts to frustrate judgment in this pending action. While that evidence is *relevant*, the Court finds that it is not sufficient to withstand the ample showing on rebuttal that defendants have made use of the funds solely in the ordinary course of business.[18]

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[17] It is particularly relevant to the Court that Mrs. Reich has made disclosures during her deposition without invoking her Fifth Amendment rights with respect to illegal transfers of money in Europe and alleged bribes to corporate officials. *See* Tr. 2-13, 18, 25.

[18] In the context of this case, "ordinary" does not imply "typical" or "average" with respect to other businesses. The proper test of whether defendants acted in the ordinary course of business is to ask whether defendants altered their customary conduct of business wtih respect to the *Dayco* commissions?

CONCLUSION

Based on all of the evidence and the arguments of counsel interpreting that evidence, the Court finds that defendants adequately have rebutted plaintiff's prima facie showing under N.Y. CPLR § 6201. Therefore, plaintiff's motion to confirm the attachment granted on June 4, 1982 is hereby denied.

It Is So Ordered.

Dated: New York, New York
September 27, 1982

/s/ Mary Johnson Lowe
United States District Judge

(3)

No. 87-1464

IN THE

Supreme Court of the United States

October Term, 1987

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON, JR.,
Petitioners,

against

ALICANTO, S.A. and WILLIAM H. SHAW,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

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Of Counsel:
MEYER, SUOZZI, ENGLISH
& KLEIN, P.C.

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STATUTE INVOLVED

New York Civil Practice Law and Rules §6212. Motion papers; undertaking; filing; demand; damages.

"(a) Affidavit; other papers. On a motion for an order of attachment or for an order to confirm an order of attachment, the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff."

No. 87-1464

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1987

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON, JR.,

Petitioners,

-against-

ALICANTO, S.A. and WILLIAM H. SHAW,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

A. The attachment motion was denied in the district court because plaintiffs failed to show a probability of success on the merits.

New York's attachment statute, CPLR 6212(a), authorizes an order of attachment where the defendant is a

foreign resident but only if the plaintiff can demonstrate a probability of success on the merits.

Because, as foreign residents, respondents (hereinafter "defendants") could only successfully oppose the attachment motion by showing the petitioners' (hereinafter "plaintiffs'") inability to demonstrate a probability of success on the merits, defendants agreed to extend the life of the temporary restraining order granted on December 30, 1986 so they could simultaneously prepare their opposition to plaintiffs' motion and prepare a motion for summary judgment. Pursuant to a "so ordered" stipulation executed by the attorneys for all parties, defendants served and filed their papers on April 24, 1987.

The Federal Rules do not provide plaintiff with the right to reply to defendants' papers filed in opposition to plaintiffs' motion for an order of attachment. F.R.Civ.P. 6(d) provides for a motion and opposing affidavits only.

Even though plaintiffs were not entitled under the Rule to a reply on the attachment motion, under the so ordered stipulation plaintiffs were given three weeks after the April 24, 1987 service of defendants' papers, that is, until May 15, 1987, to respond.

Instead of filing papers by May 15, 1987, however, on May 8, 1987 plaintiffs moved for additional time, to June 19, 1987, to respond to defendants' summary judgment motion. They also asked to have the temporary restraining order further extended until at least that time. Defendants opposed extension of the temporary restraining order since plaintiffs had failed to show good cause for such extension. F.R.C.P. 65(b) (requiring, inter alia, that "the Court shall proceed to hear and determine such motion [to dissolve a temporary restraining order] as expeditiously as the ends of justice require.") Defendants asked the court to decide the attachment motion upon the papers submitted to that date which it did

on May 14 after determining that the plaintiffs had failed to demonstrate a probability of success on the merits as required by CPLR 6212.*

After district court judge Jack B. Weinstein denied plaintiffs' motion for attachment, plaintiffs asked for a rehearing or, alternatively, for a stay pending appeal. By order entered May 22, 1987, the district court granted plaintiffs a rehearing.

In support of their motion for a rehearing on the attachment motion, plaintiffs submitted a brief and an additional 41 pages of affidavits and affirmations. After considering them, and after

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* At p. 7 of their petition, plaintiffs state that "on May 14, 1987 ... the defendants moved on one's day notice to ... to dissolve the restraint and deny the attachment." Plaintiffs fail to mention that the so-ordered stipulation signed on April 7 required any reply papers on the attachment motion to be served by May 15 and that by May 15 plaintiffs had repudiated that stipulation by failing to serve papers and by instead moving for an adjournment.

affording plaintiffs oral argument on their motion, on May 27, 1987 the district court again determined that plaintiffs had not shown a likelihood of success on the merits, denied their motion for an order of attachment, and vacated the ex parte temporary restraining order granted on December 30, 1986. In its order, the court granted the plaintiffs further leave to renew their motion "upon a showing of further merit." (A-6) The plaintiffs have not, to date, taken such opportunity.

In their papers addressing the merits of the plaintiffs' claims, the defendants demonstrated the following to the district court:

1. Agnew was not the procuring cause of the Air Force contract

Defendants demonstrated by citation to the complaint and to plaintiff Agnew's deposition that Agnew seeks a commission as the procuring cause of the contract between Aydin Corporation and the Argentine Air Force. They also set forth the case law authority demonstrating that

this requires Agnew to show there was a "direct and proximate link" between his efforts and the consumation of the contract. But defendants also showed that Agnew admitted at deposition:

(a) Agnew never heard of the Air Force contract prior to its execution.

(b) Agnew never learned, up to the time of his deposition, the purpose of the Air Force project, what equipment was involved in the Air Force project, where the equipment was located, who participated in negotiations on the project and when the contract was negotiated.

(c) Agnew had no evidence that any government officials he met in Argentina ever had anything to do with the Air Force contract.

(d) At no time during either of Agnew's trips to Argentina did he discuss the Air Force project with anyone nor did he ever hear of it.

In the Court of Appeals, Agnew admitted that he was not retained to

secure the Air Force contract and that he did not act as a broker with respect to the Air Force contract. Indeed, at the oral argument on the rehearing motion in the district court Agnew's attorney conceded as follows:

> "In their opposition [to] the motion the defendants have said ... Mr. Agnew knew nothing about the Air Force contract. He never said that he did. He never said that he went down there to get an Air Force contract; that he knew anything about the Air Force contract. He was retained, as he said in his deposition, he was told by Nelson of [Aydin], it was important for him to talk to the junta to get the contract. He doesn't know what contract that was; Army, Navy, Air Force. He has never claimed that he knew what contract that was.
>
> "He knew of a telecommunications contract for the Argentine military, that's all he knew."
>
> * * *
>
> "He has not said he was the procuring cause of this contract, he only said that he was engaged by Nelson of [Aydin] to go and present [Aydin] Corporation to the junta to show that

> [Aydin] Corporation could bid on telecommunication projects."

Since Agnew conceded he was not "the procuring cause of this contract," and since his admissions at deposition conclusively proved he was not, he failed to show a likelihood of success on his complaint seeking a commission on the Air Force contract.

2. Woolverton's claim is barred by his August 9, 1984 termination agreement with Alicanto.

Woolverton's claim that he is entitled to a share of the Alicanto commission from the Air Force contract is disproven by his testimony at deposition and by the documents identified by him at deposition. In particular, an August 9, 1984 agreement which terminated Woolverton's association with Alicanto, which he negotiated with the assistance of counsel, by its terms was entered into

> "[i]n view of the termination of the association between [Woolverton] and [Alicanto], and the further desires of both Woolverton and Alicanto to agree as to Woolverton's participa-

> tion in the following pending and future possible projects...."

The agreement further provided:

> "This agreement sets forth all projects pending between the parties as of the date of this agreement.
>
> "This agreement may not be changed other than by a further agreement in writing signed by both parties."

At deposition, Woolverton conceded that on August 9, 1984, when the above agreement was executed, Alicanto was still receiving commissions from Aydin on the Air Force contract. Clearly, then, the Air Force project was one of Alicanto's "pending projects". Nevertheless it was not included in the August 9 agreement as a project concerning which Woolverton was entitled to a commission. This showed that Woolverton's pleaded claims for a commission on the Air Force project were lacking in merit.

B. In the Court of Appeals, plaintiffs grounded their appeal on the claim that the district court judge abused his discrein refusing to grant them a lengthy adjournment of their attachment motion.

It is noteworthy that not until page 20 of their petition for writ of certiorari do plaintiffs mention the fact that the district court denied their motion for attachment on the ground that plaintiffs had not shown a probability of success on the merits as required to CPLR 6212(a). It is equally noteworthy that in setting forth the statutes involved at pp. 2-4 of their petition, plaintiffs do not even cite 6212(a), although it was the basis for the district court's disposition. The reason for these lacunae is clear: the plaintiffs did not and cannot challenge the district court's view of the merits of their case.

In their principal Court of Appeals brief, plaintiffs began their discussion of the facts by stating that "this case [is] in essence entirely

> concerned with procedure in the district court...."

This conclusion was based on the contention, set forth in the Argument section of plaintiffs' brief, that

> "[w]ithout affording the plaintiffs the opportunity to complete their discovery and submit its fruits or other matter in opposition to the defendants' motion for summary judgment, the court below has, without waiting to hear or consider any papers in opposition prepared by the plaintiffs in answer to the defendants' motion, in effect granted partial summary judgment against them with respect to whatever unspecified allegations and points of law the court may have relied upon in determining that they had failed to show a probability of success on the merits."

In their Synopsis of Argument, the plaintiffs

> "urge[d] that the order appealed from be reversed and set aside with direction to the district court to maintain the temporary restraining order in effect until the plaintiffs' attachment motion and the defendants' summary judgment motion are 'simultaneously considered' and disposed of in accordance with the defendants'

> application and the Court's order of March 4, 1987."

And in their Reply Brief in the Second Circuit, plaintiffs recapitulated their argument as follows:

> "In their opening brief, the plaintiffs have shown that the order of the district court vacating the temporary restraining order and denying attachment should be reversed and set aside because that order constituted a grant of partial summary judgment on one's day notice...."

Thus, in the Court of Appeals plaintiffs based their argument on the district court's alleged abuse of discretion in refusing to grant them an adjournment.

C. In the past nine months since the attachment motion was plaintiffs have not sought to establish a probability of success on the merits notwithstanding the district court specifically granted "leave to renew upon a showing of further merit" and notwithstanding plaintiffs have obtained to this date successive stays of the vacatur of the temporary restraining order. To the contrary, plaintiffs refused defendants' offer to renew the attachment motion at the time defendants' summary judgment motion was considered.

Although plaintiffs have argued in the Second Circuit and in this Court that the denial of their attachment motion on May 27 marked the death knell of their case, and have similarly argued that the refusal of the district court to grant a further adjournment of the attachment motion in effect constituted "partial summary judgment against plaintiffs", the fact is that in its May 27 order denying attachment the district court specifically granted the plaintiffs

> "leave to renew upon a showing of further merit." (A-6)

And yet, in the almost ten months since that order was entered, plaintiffs have made no effort to demonstrate in a renewal motion a probability of success on the merits notwithstanding they have obtained successive stays of the vacatur of the temporary restraining order. This is perhaps the best evidence of the weakness of plaintiffs' case and the lack of merit to their attachment motion.

Since the relief plaintiffs requested in the Court of Appeals was a directive to the district court that

> "the plaintiffs' motion for attachment and the defendants' motion for summary judgment [be] considered simultaneously and determined"

(plaintiffs' principal brief, p. 41), when the defendants' summary judgment motion came on to be heard by the district court before the argument of the appeal in the Second Circuit, the defendants requested that the district court reconsider the attachment motion in the light of plain-

tiffs' summary judgment papers. Mirabile dictu, the plaintiffs objected to reconsideration of their attachment motion notwithstanding this was precisely the relief they requested in the Court of Appeals.

The obvious strategy of the plaintiffs was to prolong as long as possible the opportunity to complain that they had never been adequately heard on the merits of their case. The strategy backfired, however, when the district court, in the course of its decision denying summary judgment, stated that the plaintiffs' case was "very thin," "highly dubious," and "awfully thin."

These repeated findings of the district court judge, after consideration of the plaintiffs' summary judgment papers, effectively answered plaintiffs' prayer for relief in the Court of Appeals that their summary judgment papers be considered in determining whether plaintiffs showed a probability of success on

the merits so as to sustain an order of attachment.

Summary of Argument

In their complaint, both plaintiffs seek to share commissions earned by defendant Alicanto, S.A. in connection with a $57 million telecommunications contract between the Argentine Air Force and Aydin Corporation; plaintiff Agnew alleges he was the procuring cause of the contract and plaintiff Woolverton claims he had an employment agreement to share in the commissions.

In the extensive papers submitted by plaintiffs on December 30, 1986 in support of an order of attachment and for an ex parte provisional order of attachment or restraining order, plaintiff Agnew failed to disclose (but later conceded at deposition) that although he was seeking a commission as the procuring broker on the Aydin/Argentine Air Force contract, he in fact never heard of the Air Force contract prior to its execution,

never discussed the contract with anyone, and didn't even know whether any government official he met in Argentina had anything to do with the Air Force contract. Similarly, Woolverton failed to disclose in his affidavit that although he was claiming an oral employment agreement with Alicanto for a commission on the Air Force contract, he in fact signed a written termination agreement with Alicanto on August 9, 1984, in the presence of his attorney, setting forth "all projects pending between the parties" for which he would be entitled to a commission but failing to mention the Aydin Air Force contract.

On December 30, 1986, plaintiffs obtained an ex parte restraining order, in lieu of a provisional order of attachment, preventing defendants from using their New York property ($380,000 of which all but $40,000 belongs to the individual defendant William H. Shaw). On May 27, 1987, the plaintiffs' motion for an order of attachment was denied because

plaintiffs failed to show a probability of success on the merits, and the restraining order was vacated. Nevertheless, plaintiffs have obtained successive stays of the vacatur of the restraining order until the present day, 15 months after it was granted ex parte and notwithstanding plaintiffs were unable to show to the district court a probability of success on the merits.

In the Second Circuit, the plaintiffs did not seek to demonstrate a meritorious case; rather, they grounded their appeal on the claim that the district judge had abused his discretion in refusing to grant them a lengthy adjournment of their attachment motion so it could be heard simultaneously with defendants' motion for summary judgment. In Point I below we show this refusal to grant an adjournment was not appealable.

In response to plaintiffs' appeal, the defendants offered to have the attachment motion reconsidered by the district court at the time of the summary

judgment argument, but plaintiffs rejected the offer notwithstanding this was precisely the relief they were seeking in the Second Circuit. Thereafter, although the district court judge had granted plaintiffs leave on May 27, 1987 to renew their motion for an attachment "upon a showing of further merit," they failed to do so.

On these facts, the Second Circuit found the May 27 order not final "because it is subject to a renewal motion upon a showing of changed circumstances." In Point II below we show this ruling was correct on the particular facts of this case and fails to present a question of general interest which would warrant review by this Court.

New York's attachment statute was substantially amended in 1977 after a three judge district court found the predecessor statute unconstitutional. That court so ruled primarily because the statute was read as not requiring the plaintiff "to litigate the question of the likelihood that it would ultimately pre-

vail on the merits." See Carey v. Sugar, 425 U.S. 73,77.* Although the order of the three judge district court was subsequently vacated pending a construction of the statute by the New York State courts, Carey v. Sugar, supra, New York as well as other states (e.g., New Jersey, see Britton v. Howard Sav. Bank, 727 F.2d 315, 319 [3d Cir. 1984]) decided to amend their attachment provisions to avoid the constitutional problems noted in Carey v. Sugar. The New York amendments were intended, specifically, to place upon the

* Compare Fuentes v. Shevin, 407 U.S. 67, 87 (striking down replevin statutes for failing to mandate pre-seizure hearing on ground Due Process clause requires an opportunity to be heard before deprivation of any significant property interest. "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property."), and North Georgia Finishing v. Di-Chem, 419 U.S. 601, 607 (striking down Georgia's garnishment statute because "there is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment").

plaintiff the burden of establishing the likelihood of success on the merits at the time of the attachment motion. See Weinstein, Korn & Miller, New York Civil Practice, ¶ 6223.05; McLaughlin, Practice Commentaries, McKinney's New York CPLR C6212.1.

The New York attachment statute as amended in 1977 contemplates a motion to confirm an attachment within 10 days of levy based upon a showing of a probability of success on the merits. Yet, in the present case plaintiffs have sterilized defendants' use of their property for 15 months without ever demonstrating a likelihood of success and solely because they obtained an ex parte order based upon affidavits which failed to disclose the obvious defects in their case. The restraining order which plaintiffs have been able to maintain to this day has caused defendants (particularly William H. Shaw) great hardship and constitutes just the kind of pretrial deprivation without hearing which the New York attachment

statute, and this Court's Due Process cases, were designed to prevent.

REASONS FOR DENYING THE WRIT

Point I

Plaintiffs' appeal to the Court of Appeals was based on Judge Weinstein's refusal to grant further adjournment of the attachment motion which determination was not appealable.

Plaintiffs based their appeal in the Second Circuit on the contention that Judge Weinstein should have further adjourned the attachment motion so as to hear it at the same time as the defendants' summary judgment motion. Plaintiffs requested in their prayer for relief that the two motions be "considered simultaneously."

But Judge Weinstein's refusal to grant further adjournments of the attachment motion and his refusal to further extend the temporary restraining order were within the proper exercise of

his discretion and nonappealable. Compare Hart v. Community Sch. Bd. of Brooklyn, N.Y. Sch. Dist. #21, 497 F.2d 1027 (2d Cir. 1974), with N.A.A.C.P. v. Thompson, 321 F.2d 199 (5 Cir. 1963). Particularly is this so since New York CPLR §6211 contemplates a motion to confirm an attachment within 10 days of levy, and F.R.C.P. 65(b) contemplates a hearing on a temporary restraining order within at most 20 days of issuance. Here, plaintiffs had almost five months during which they prepared their attachment motion papers, had another four months before defendants filed their papers in opposition, had three more weeks to file reply papers, were then given another twelve days to file papers on rehearing, and finally were given leave to renew their attachment motion upon a showing of further merit which right they failed to exercise in the next nine months.

Repeatedly, plaintiffs have argued they were given just "one-day's notice" that their attachment motion would

be heard on May 15 and they were not given sufficient time to reply to the defendants' papers. As noted above (ftn. p. 4), what plaintiffs fail to advise this Court is that a so-ordered stipulation signed on April 7 required any reply papers on the attachment motion to be served by May 15 and that on May 15 plaintiffs had repudiated the stipulation by failing to serve their papers and by instead moving for a lengthy adjournment. Nevertheless, the plaintiffs' moving attachment papers were considered on the motion which was all plaintiffs were entitled to have considered under the New York attachment statute and the federal rules. In any event, on the rehearing motion plaintiffs presented a brief and 41 pages of reply affidavits and affirmations in support of attachment which were considered by the district court.

In sum, then, plaintiffs based their appeal below not on the merits of their motion but upon the refusal of the district court judge to grant an adjourn-

ment. Since an order denying a motion for an adjournment in the circumstances set forth above is not appealable, a writ of certiorari should not be granted to consider the question presented in the plaintiffs' petition.

Point II

The Court of Appeals properly found that the May 27 order lacked finality since plaintiffs have had over nine months from the date their attachment motion was denied to renew their motion, and since plaintiffs were offered the opportunity to renew their attachment motion at the time the summary judgment motion was heard and refused said opportunity.

Plaintiffs were expressly given the opportunity in Judge Weinstein's May 27 order to renew their motion for an attachment "upon a showing of further merit" and have failed to date to do so notwithstanding the continuance of the stay of the vacatur of the temporary restraining order. Moreover, although the relief sought by plaintiffs in the Court of Appeals was an order requiring the

attachment and summary judgment motions to be heard simultaneously, when defendants offered plaintiffs the opportunity to renew their attachment motion so as to be heard simultaneously with the summary judgment motion plaintiffs rejected the offer.

Under these circumstances, plaintiffs simply cannot bring themselves within the authorities cited at pp. 8-15 of their petition which, they say, hold final an order which makes further litigation on the merits an "empty rite." The Court of Appeals was correct in finding that the May 27 order lacked finality "because it is subject to a renewal motion upon a showing of changed circumstances." (A-2)

CONCLUSION

The petition should be denied.

Dated: Mineola, New York
March 31, 1988

Respectfully submitted,

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No. 87-1464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SPIRO T. AGNEW and
WILLIAM H. WOOLVERTON, JR.,

Petitioners,

– against –

ALICANTO, S.A. and WILLIAM H. SHAW,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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April 14, 1988

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Pursuant to Rule 22.5 of this Court, the plaintiffs petitioners make this reply brief addressed to arguments first raised in the brief in opposition.

I. Contrary to the defendants' contentions, the plaintiffs have had no actual "opportunity" to renew their motion for attachment.

Throughout the defendants-respondents' brief in opposition ("DBr"), the principal ground they repeatedly assert for non-appealability of the district court order is the "opportunity" purportedly given to the plaintiffs to renew their motion for

attachment. This, the defendants contend falsely in various paraphrases, plaintiffs "refused," DBr13, *"objected to"* [defendants' italics] *id.* 15, "rejected," *id.* 19, and "failed to exercise," *id.* 23; elsewhere in their brief the defendants make other statements of the same import.

For two reasons, one, the precise reason given by this Court in *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950) no such "opportunity" ever existed. As set forth in the petition ("P") 8, the defendants have forthrightly and unequivocally stated that unless the district court's order was stayed, they would remove their property from New York, and the plaintiffs would not be able to satisfy any judgment they might get.

Any renewed motion by the plaintiffs for attachment and restraint upon the defendants' removal of their property was conditioned by the district court upon the plaintiffs' moving on fifteen days notice with an evidentiary hearing to follow, P21, Appendix ("App.") A-6. Accordingly, as developed in the petition, any "opportunity" the district court may have afforded the plaintiffs to move to attach the defendants' property by renewed motion "upon a showing of further merit" was wholly illusory and chimerical, as aptly characterized by this Court in *Swift & Co., supra*, "an empty rite . . . only theoretically possible." 339 U.S. at 689.

Under those circumstances, the plaintiffs had no reasonable alternative to an appeal and stay of the district court order pending appeal as the only avenues open to them as means of actually securing a possibly collectable judgment. By that appeal and stay, the district court was divested of jurisdiction of the attachment motion as the defendants' attorney was immediately told by that court when he sought a renewed ruling on the attachment motion at the same October 2, 1987 hearing in which summary judgment was denied.

Contrary to the defendants' false assertions, it was never the plaintiffs who "refused," "rejected" or "objected" to a renewal of the attachment motion. It was Chief Judge Weinstein, who

told the defendants' attorney in response to his effort to have the motion reconsidered, "I have no jurisdiction." Transcript of October 2, 1987 hearing on summary judgment ("Transcript, 10/2") 3. When the defendants' attorney attempted nevertheless to pursue the matter, despite Judge Weinstein's statement, the judge told him with finality, "I'll not do a thing as long as its [sic] on appeal. * * * Let them [the court of appeals] decide. I won't do it." *Id.*

II. The defendants' brief in opposition is directed in major part to the merits of the case and of the motion for attachment. Not only are these arguments irrelevant to the court of appeals decision and the petition, but they rest on purported premises lacking foundation in fact.

Although the court of appeals has incisively disclaimed any expression of "opinion on the merits of either the motion for order of attachment or the underlying case," App. A-2, the merits of both are the major subjects argued by the defendants in their brief in opposition to the petition. With no record here, the defendants are asking this Court to accept as true disputed allegations that the district court after study of the defendants' 900-page summary judgment motion uniformly found to be insufficient in the face of the plaintiffs' opposing proofs and law. The defendants used the same arguments in the court of appeals, who explicitly noted that they expressed no opinion on the merits.

To the plaintiffs' ten claims in their complaint, the defendants addressed 900 pages of affidavits, exhibits and memoranda in support of summary judgment, accompanied by a 2800-page document production and 650 pages of deposition transcript, for a grand total of 4300 pages. In their papers they argued in support of summary judgment on all the plaintiffs' claims, urging some seventeen separate and distinct alleged grounds under American federal and New York law in an 81-page memorandum, plus five alleged grounds in a 40-page memorandum of Argentine law (in affidavit form). The district court rejected

them all as insufficient to support summary judgment in the face of the plaintiffs' answering papers.

Accordingly and *a fortiori* the defendants' contentions regarding the relative merits of the plaintiffs' case and their own have no place in an argument to this court with respect to the grant of a writ of certiorari to review a decision that expressly avoided any opinion on the merits.

The issue now before this Court is the appealability of the district court order dissolving the restraint and denying attachment. The defendants at no point challenge the plaintiffs' showing of conflicts on that issue between the court of appeals decision in this case and the contrary decisions of this court and other courts of appeals (including conflicts with decisions of other panels of the Court of Appeals for the Second Circuit). Nor do they even attempt to reconcile the court of appeals decision in this case with its decision, in which two members of the panel on this case participated, in *Dayco Corp v. Foreign Transactions Corp.*, 705 F.2d 38 (2d Cir. 1983) primarily relied upon by the court in its decision in this case.

Less than a month ago, in *Gulfstream Aerospace Corporation v. Mayacamas Corporation*, 56 U.S.L.W. 4243 (U.S. March 22, 1988) this Court, citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and the three-pronged test of *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) reaffirmed the principles applied in *Swift & Co., supra.* The district court order here appealed from fully meets that test. It "conclusively determine[d] the disputed question" of the plaintiffs' right to an attachment, which "resolve[d] an important issue completely separate from the merits of the action," inasmuch as the district court has held that this action must go to trial, and court of appeals has stated that it expressed no opinion on the merits. Finally, for the reasons set forth above the defendants themselves have made it clear that the order appealed from is "effectively unreviewable on appeal from a final judgment." 56 U.S.L.W. at 4245.

A. The insufficiency of the defendants' summary judgment motion.

While the defendants have quoted the district court's statements in the hearing in which it denied summary judgment "that the plaintiffs' case was 'very thin,' 'highly dubious,' and 'awfully thin,' " they have notably avoided quoting the context in which these remarks were made, Transcript 10/2, 8:

> I'll not grant summary judgment on it because there are all of these issues.

They have also omitted the court's many prior and subsequent rulings at the same hearing regarding the insufficiency of the defendants' grounds for summary judgment on even one of the plaintiffs' ten claims despite their mammoth motion papers and their extensive, multifarious contentions.

Well prior to characterizing the plaintiffs' case as "very thin," the district court at the very threshhold of the defendants' attorney's unsuccessful argument of his motion for summary judgment, had held, Transcript 10/2, 4:

> I read your papers. It's clear there are all kinds of facts here. * * * I will listen to you, but it's clear to me this confused factual tango [sic] requires a trial. * * * How can I grant summary judgment in this kind of a case?

And on the following transcript page, *id.* 5:

> It seems to me there are so many imponderables that I could not grant summary judgment in good faith.

And on the next page after that, *id.* 6, when the defendants' attorney continued to press the court, "I'm not satisfied to grant summary judgment in this case." Finally, after defendants attorney had persisted unavailingly for four more pages of transcript and still strove further to prolong his consistently ineffective arguments, the court courteously but firmly refused to entertain further discussion, *id.* 10:

> I don't really want to extend it. * * * I have read the papers and there is nothing that I can do here just too many factural [sic] questions that I have in my mind.

B. The plaintiff Agnew has never claimed to be the "procuring cause" of the award of the telecommunications contract that led to this lawsuit. The defendants' contentions that he was not are factually superfluous to the merits of both the case and the attachment motion, and therefore, entirely irrevelant to the issues now before this Court.

At no point in the plaintiffs' papers in this case and at no time since its inception have the plaintiffs ever averred or in any way implied that Agnew was the "procuring cause" or the "procuring broker" in the award of the telecommunications contract. Whether Agnew was a "procuring cause" or "procuring broker" is a matter of law, fact or both, and is not and has not been in issue. The defendants made this same contention on the merits of the case to the district court on summary judgment, and it was rejected as insufficient therefor.

Aydin and the defendants set up the October 6, 1980 meeting with Agnew in Washington, where they engaged him to present Aydin to the Junta because they had no entree to the Junta, and he did. Although, the defendants contend at page 6 of their brief that "Agnew had no evidence that any government officials he met in Argentina ever had anything to do with the Air Force contract," this is no more than a cunning, carefully fashioned red herring of the same species as their "procuring cause" argument. Agnew intervened with the Junta on Aydin's and the defendants' behalf because they had expressly requested him to at the October 10, 1980 meeting in Washington, advising him that Aydin's introduction to the Junta, which neither of them had been able to accomplish, was a prerequisite for its qualifying as a bidder on military telecommunications contracts.

C. The defendants' contentions addressed to the merits of the case, asserting that Woolverton's claim is barred are irrelevant to the issues before this Court and devoid of substance.

These contentions also were held by the district court to be insufficient to support summary judgment. The termination agreement provides at its very outset that it applies to the "following pending and future possible projects." It then enumerates and describes four projects, which do not include the Aydin Argentine air force contract, as on the date of the agreement, August 9, 1984, it had been fully completed. After the enumeration and description of the four projects, the agreement says that it "sets forth all projects pending between the parties as of the date of this agreement," but nowhere does it define "projects" or "pending."

As Woolverton points out in his affidavit in opposition to summary judgment, each one of the four "pendng and future possible projects" enumerated in the agreement was either, as those words plainly denote, a project on which his own work was then unfinished (no. 1) or a "possible project" (nos. 2 and 3) or a "future project" (no. 4).

An agreement is to be construed against the party who drew it. This agreement had not been negotiated by Woolverton "with the assistance of counsel," DBr 8, but had been prepared by defendants' attorney, Gass, at the defendant Shaw's direction without consultation with or notice to Woolverton. Shaw had then brought Gass to Woolverton in Alicanto's New York office, without Woolverton's prior knowledge. Before signing, Woolverton was able to get his son, then five years out of law school, to come over and look at it.

By the familiar rule of "*inclusio unius est exclusio alterius*," Shaw's causing Gass to have the agreement drawn with neither mention of the Aydin contract nor broad language extending its ambit beyond the projects expressly named surely demonstrates that it was not intended to apply to the Aydin telecommunications contract, which had been completed and was not then within the ambit of "pending projects," as Woolverton testified on his deposition.

III. The defendants' assertion that the plaintiffs' appeal below was allegedly predicated upon the district court's abuse of discretion in refusing to grant an adjournment is contrary to fact and completely without foundation in the record or the court of appeals decision.

Although the brief in opposition strenuously seeks to make it appear that the four-month extension of the attachment motion and the TRO were somehow the plaintiffs' doing, the latter, like plaintiffs generally, were eager to get on with the case and bring the attachment motion to a head. On March 4, 1987, seven and one-half weeks after the date the court had originally set for plaintiffs' attachment motion, as a result of the successive adjournments requested solely by the defendants, they moved against the plaintiffs' vigorous opposition "To Consolidate Plaintiffs Motion for Order of Attachment with Defendants Motion for Summary Judgment" and for still further delay and extension of the TRO so that they might prepare their motion for summary judgment. Their motion, and the court order they drafted expressly provided for their summary judgment motion to be consolidated and "considered simultaneously" with the plaintiffs' attachment motion.

Ultimately on April 24, 1987, fifteen weeks after the initial return date of the plaintiffs' attachment motion, the defendants served as their answer to the plaintiffs' motion for attachment their 900-page summary judgment motion, together with deposition transcripts and document production for a grand total of 4300-pages, as noted above. In fact Aydin's counsel had previously told the plaintiffs' counsel, "If you bring this suit, you will see nothing but paper."

In accordance with the defendants' scheme, on May 13 they moved on one-day's notice to the plaintiffs to dissolve the restraint before the latter had had anything approaching reasonable time to respond to the 900-page summary judgment motion, which the defendants had taken fifteen weeks to prepare. Although the district court on May 14 agreed readily

and unreservedly with the plaintiffs' attorney that the eighteen-week duration of the TRO until May 14 was entirely the result of the defendants' requests for adjournments, App. A-10, and further agreed that it was a difficult case and the defendants that submitted "a lot of paper," and said that he did not want to pressure the plaintiffs, who could "have all the time" they want, "all the time you need," he nevertheless orally dissolved the temporary restraint and denied the plaintiffs' attachment motion. App. A-9, 10.

Upon rehearing he adhered to his oral May 14 order with his written order of May 27, 1987. From this the appeal was taken, App. A-4, on the ground that it was an abuse of discretion and denial of due process of law for the district court to sever the attachment motion from the summary judgment motion in violation of its prior order of consolidation requiring them to be 'considered simultaneously" and to grant the defendants partial summary judgment, on one day's notice to the plaintiffs, *ex parte* on the basis of only the defendants' papers, but not "with the benefit of a fully developed record," as their March 4 motion had provided.

IV. The defendants' contention that the plaintiffs had no right to reply to the defendants' summary judgment motion submitted in opposition to the motion for attachment is contrary to the applicable law.

The defendants acknowledge that the plaintiffs' were entitled to a reply by a certain date, DBr 4n, but disregard the consolidation order of March 4, 1987, requiring the two motions to be "considered simultaneously."

The power of the district court to grant an order of attachment is provided by F.R.C.P. 64. That rule provides that attachments "are available under the circumstances and in the manner provided by the law of the state."

The defendants agree with the plaintiffs that the *ex parte* restraining order granted the plaintiffs at the commencement of the case is tantamount to a provisional order of attachment. DBr 17. Under New York law, upon a motion to vacate or modify

an order of attachment, "the court may give the plaintiff a reasonable opportunity to correct any defect." N.Y. CPLR § 6223(a). The courts of New York have decided that in order to give any meaning to this provision that

> on a motion to vacate an order of attachment the court is not restricted to the documents submitted in support of such attachment, but shall give the plaintiff a reasonable opportunity to correct any defect.

Worldwide Carriers, Ltd. v. Aris Steamship Co., 301 F. Supp. 64, 66 (S.D.N.Y. 1968). There the district court follows the reasoning advocated in Weinstein-Korn-Miller, *7A New York Civil Practice*, 62-251 ¶ 6223.07:

> "Since most defects on the plaintiff's motion papers or in the attachment order can be corrected easily and since all proceedings under CPLR 6223 are on notice, new proof that would tend to sustain the attachment always should be admitted on a motion under CPLR 6223 unless there is a clear showing of prejudice."

CONCLUSION

For the reasons stated above, the defendants' brief in opposition states no sufficient grounds for the denial of a writ of certiorari, and, therefore, for the reasons set forth in the petition such a writ should issue to the United States Court of Appeals for the Second Circuit to review its order and opinion in this case.

Respectfully submitted,

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APRIL 12, 1988